TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

No. 242

VERNIE BAILESS, COUNTY TREASURER, CADDO COUNTY, OKLAHOMA, ET AL., PETITIONERS,

vs.

JUANA PAUKUNE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

PETITION FOR CERTIORARI FILED JULY 31, 1952
CERTIORARI GRANTED OCTOBER 13, 1952

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No.

VERNIE BAILESS, COUNTY TREASURER, CADDO COUNTY, OKLAHOMA, ET AL., PETITIONERS,

vs.

JUANA PAUKUNE

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 21, 1952.

—2949

[fols. 1-3] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 34547

VERNIE BAILESS, County Treasurer of Caddo County, Oklahoma, W. B. COLEMAN, County Assessor of Caddo County, Oklahoma; and BOARD OF COUNTY COMMISSIONERS OF CADDO COUNTY, OKLAHOMA, composed of TED A. JONES, FRANK DUNCAN and GEORGE D. NIXON, Plaintiffs in Error,

vs.

JUANA PAUKUNE, Defendant in Error

PETITION IN ERROR—Filed February 10, 1950

The said Vernie Bailess, County Treasurer of Caddo County, Oklahoma, W. B. Coleman, County Assessor of Caddo County, Oklahoma; and Board of County Commissioners of Caddo County, Oklahoma, composed of Ted A. Jones, Frank Duncan and George D. Nixon, plaintiffs in error, complain of said defendant in error, for that the said Juana Paukune, at the July, 1949, term of the District Court of Caddo County, State of Oklahoma, recovered a judgment, by consideration of said Court, against the said Vernie Bailess, County Treasurer of Caddo County, Okla- [fol. 4] homa, W. B. Coleman, County Assessor of Caddo County, Oklahoma; and Board of County Commissioners of Caddo County, Oklahoma, composed of Ted A. Jones, Frank Duncan and George D. Nixon, in a certain action then pending in the said Court, wherein the said Juana Paukune was plaintiff and the said Vernie Bailess, County Treasurer of Caddo County, Oklahoma, W. B. Coleman, County Assessor of Caddo County, Oklahoma; and Board of County Commissioners of Caddo County, Oklahoma, composed of Ted A. Jones, Frank Duncan and George D. Nixon were defendants. The original case-made, duly signed, attested, and filed, is hereunto attached, marked "Exhibit A", and made a part of this petition in error; and the

said Vernie Bailess, County Treasurer of Caddo County, W. B. Coleman, County Assessor of Caddo County, Oklahoma; and Board of County Commissioners of Caddo County, Oklahoma, composed of Ted A. Jones, Frank Duncan and George D. Nixon avers that there is error in the said record and proceedings, in this to-wit.

(1) Said Court erred in overruling the motion of plaintiffs in error for a new trial.

(2) Said Court erred in not rendering judgment for the plaintiffs in error.

(3) That the judgment of the Court is contrary to law.

(4) That the judgment of the Court is contrary to the evidence.

(5) Error of the Court in granting permanent injunction.

[fol. 5] (6) Error of the Court in finding lands not taxable for ad valorem taxes.

(7) Said Court erred in overruling demurrer to the evidence.

Wherefore plaintiffs in error pray that said judgment so rendered be reversed, set aside, and held for naught, and that a judgment may be rendered in favor of the plaintiffs in error, and against the defendant in error, and that the injunction and restraining order be dissolved and the plaintiffs in error be restored to all rights lost by rendition of such judgment, and for such other relief as to the Court may seem just.

Vernie Bailess, County Treasurer of Caddo County, Oklahoma, W. B. Coleman, County Assessor of Caddo County, Oklahoma; and Board of County Commissioners of Caddo County, Oklahoma, composed of Ted A. Jones, Frank Duncan and George D. Nixon By (Frank Limerick), County Attorney of Caddo County, Oklahoma.

(Brewster McFadyen), Attorney for Plaintiffs in Error.

[fol. 6] I, hereby certify that a true and exact copy of the above petition, was by me mailed to Jim Hatcher, attorney of record for defendant in error, at Chickasha, Oklahoma, on the 9th day of February, 1950.

Brewster McFadyen.

[fols. 7-9] **Exhibit "A" to Petition in Error**

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

VERNIE BAILESS, County Treasurer of Caddo County, Oklahoma, W. B. COLEMAN, Assessor of Caddo County, Oklahoma; and BOARD OF COUNTY COMMISSIONERS OF CADDO COUNTY, OKLAHOMA, composed of TED A. JONES, FRANK DUNCAN and GEORGE D. NIXON, Plaintiffs in Error,

vs.

JUANA PAUKUNE, Defendant in Error

Case Made from the District Court of the Fifth Judicial District of Oklahoma—Filed February 10, 1950

Appearances:

For Plaintiffs in Error: Frank Limerick, County Attorney, Caddo County, Oklahoma; Anadarko, Oklahoma. Brewster McFadyen, Anadarko, Oklahoma, Special Counsel.

For Defendant in Error: Hatcher & Bond, Chickasha, Oklahoma.

[fol. 10] IN THE DISTRICT COURT IN AND FOR CADDO COUNTY, STATE OF OKLAHOMA

No. 15445

JUANA PAUKUNE, Plaintiff,

vs.

VERNIE BAILESS, County Treasurer, Caddo Co., Okla., and W. B. COLEMAN, Assessor of Caddo County, Oklahoma; and BOARD OF COUNTY COMMISSIONERS OF CADDO COUNTY, OKLAHOMA, composed of TED A. JONES, FRANK DUNCAN and GEORGE D. NIXON, Defendants

PETITION—Filed October 15, 1948

Comes now the plaintiff, Juana Paukune, and for cause of action against the defendants Vernie Bailess, County Treas-

urer of Caddo County, Oklahoma, and W. B. Coleman, Assessor of Caddo County, Oklahoma, and Board of County Commissioners of Caddo County, Oklahoma, composed of Ted A. Jones, Frank Duncan and George D. Nixon, alleges and states:

[fol. 11] 1. That she is the owner of the beneficial interest in and to an undivided 1/3 interest in and to the following described land located in Caddo County, State of Oklahoma, to-wit:

> Southeast Quarter of Southwest Quarter (SE¼ SW¼) and Southwest Quarter of Southeast Quarter (SW¼ SE¼) Sec. 3, and North Half of Northeast Quarter (N½ NE¼) of Sec. 10, Township 5 North, Range 9 West of I. M. containing 160 acres,

as evidenced by a certificate called a trust patent, #951, issued on the 25th day of August, 1901, issued by William McKinley, President of the United States, and which is recorded in Volume 82 at page 447 of the records of the General Land Office of the United States; that a copy of said trust patent is attached hereto marked plaintiff's Exhibit 1 and made a part of this petition as fully as if set out herein verbatim; that the trust period mentioned in said trust patent has been extended pursuant to law and said land is being held by the United States in trust for the sole use and benefit of this plaintiff who is the wife of Paukune who died about 1919 leaving a will; that the plaintiff inherited an undivided 1/3 interest in and to said allotment; that the United States possesses a supervisory control over the land which is held by the United States for the sole use and benefit of the allottee and his heirs throughout the original or any extended period of restriction.

2. That title 25 USCA 348 provides that at the expiration of said trust period the United States will convey said lands by patent to said Indian or his heirs in fee discharge of said trust and free of all charge or incumbrance whatsoever; that said trust period has not expired and said [fol. 12] lands are non-taxable under the laws of the United States; that no final patent has been issued.

3. That the County Assessor of Caddo County, Oklahoma, has illegally assessed the above described lands as shown by the tax rolls for 1947, in the sum of $21.33; that said assessment was illegal and without authority of law; that the said defendant County Treasurer of Caddo County, Oklahoma, has extended the same on the tax rolls and shows the 1947 ad valorem taxes in the amount of $21.33 as assessed against the above deseribed property; that the County Treasurer of Caddo County has advertised said land for sale on November 1, 1948, and said lands will be sold on said date for taxes unless the County Treasurer of Caddo County is restrained and enjoined from selling said property; that the County Treasurer has notified this plaintiff of such assessment and such sale; that a copy of said notice is attached hereto and marked plaintiff's Exhibit 2 and made a part hereof as fully as if set out herein verbatim.

4. That the County Assessor has levied an illegal ad valorem tax on said land and the County Treasurer is attempting to collect an illegal tax as herein pled and pursuant to title 12 OSA 1397 the plaintiff herein is entitled to a permanent injunction against the said County Treasurer enjoining him from selling said land above described for illegal ad valorem taxes and is entitled to a permanent injunction against the said defendant County Assessor of [fol. 13] Caddo County, Oklahoma, from levying future assessments of ad valorem taxes against said property during the trust period of said property and prior to the issuance of a final patent as provided by law, and is entitled to a judgment against the Board of County Commissioners of Caddo County, Oklahoma, decreeing that they have no right, title, claim or interest in and to said lands by reason of said illegal tax levy as hereinabove pled and requiring them to issue a proper certificate of error to the County Treasurer of Caddo County to accomplish the correction and to have said taxes stricken.

5. That unless the said County Treasurer is restrained forthwith he will continue to advertise said lands above described and sell the same on November 1, 1948, at a tax sale and the plaintiff requests the court to issue a temporary restraining order forthwith enjoining said County Treasurer from selling said lands on November 1, 1948; that

unless said County Assessor is enjoined he will continue to list and assess said property for ad valorem taxes in direct violation of the law, and upon a final hearing that this plaintiff have a permanent injunction against the County Assessor of Caddo County, enjoining him from listing and assessing said property above described for ad valorem taxes during the trust period and prior to the issuance of final patent thereto by the United States, and that the County Treasurer be permanently enjoined from selling [fol. 14] said lands for ad valorem taxes during the trust period of any extensions thereof and prior to the issuance of final patent by the United States;

6. That unless the Board of County Commissioners of Caddo County, Oklahoma, are permanently enjoined they will continue to claim an interest in and to the lands of the plaintiff above described by reason of illegal ad valorem taxes listed and assessed each year during the trust period and will continue to appropriate and expend money to advertise and sell the same and this plaintiff requests that the Board of County Commissioners be permanently enjoined from claiming any right, title or interest in and to said lands by reason of any illegal tax so levied, and from expending public monies for advertising said lands for sale.

Wherefore, premises considered, the plaintiff prays the court to issue a permanent injunction against the County Assessor of Caddo County, Oklahoma, enjoining him from listing and assessing the above described property for ad valorem taxes during the trust period of said property and prior to the issuance of a final patent by the United States, and that the County Treasurer of Caddo County, Oklahoma, be permanently enjoined from selling said lands during said trust period and that said illegal taxes be stricken from the tax rolls by decree of this court and that the County Treasurer be required to show said taxes as stricken and of no force and effect on the tax rolls of Caddo [fols. 15-16] County, and that the Board of County Commissioners of Caddo County, Oklahoma, be enjoined from claiming any right, title or interest in and to said lands above described by reason of the levy and assessment of ad valorem taxes against said lands and by reason of any

illegal sale thereof, and that the said Board of County Commissioners be enjoined from appropriating and expending monies out of the public funds of Caddo County, Oklahoma, for advertising said lands for sale and that the plaintiff have such other and further relief as the court shall find to be just, proper and equitable, and

Plaintiff further prays that pending a final termination of this case that the court grant a temporary restraining order restraining the defendant Vernie Bailess, the County Treasurer of Caddo County, Oklahoma, from selling said lands at tax sale on November 1, 1948, or any date thereafter under said advertisement of sale of lands for taxes now being published and that the plaintiff have her costs herein expended.

Hatcher & Bond, Attorneys for said Plaintiff, Chickasha, Oklahoma.

STATE OF OKLAHOMA,
County of Grady, ss:

[fol. 17] EXHIBIT 1 TO PETITION

No. 951

The United States of America to all to whom these presents shall come, Greeting.

Whereas, There has been deposited in the General Land Office of the United States a schedule of allotments of land, dated May 10, 1901, from the Commissioner of Indian Affairs, approved by the Secretary of the Interior May 11, 1901, whereby it appears that under the provisions of the sixth section of the Act of Congress approved June 6, 1900 (31 Stats. 672), Pau-kune, an Apache Indian residing on the Kiowa, Comanche and Apache Reservation has been allotted the following described land, viz:

The South East quarter of the South West quarter, and the South West quarter of the Sourth East quarter of Section three, and the North half of the North East Quarter of Section ten in Township five North

of Range Nine West of the Indian Meridian in Oklahoma, containing one hundred and sixty acres,

Now know ye, That the United States of American, in consideration of the premises and in accordance with the provisions of the fifth section of the Act of Congress of February 8, 1887 (24 Stats. 388), hereby declares that it does and will hold the land thus allotted, subject to all the restrictions and conditions contained in said fifth section as modified by the fifth article of the agreement ratified by said sixth section of the Act of June 6, 1900, for the period of twenty-five years, in trust for the sole use and benefit of the said Pau-kune, or in case of his decease, for the sole use of his heirs, according to the laws of the State or Territory where such land is located, and that at the [fol. 18] expiration of said period the United States will convey the same by patent to said Indian, or his heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever.

In testimony whereof, I, William McKinley, President of the United States of America, have caused these Letters to be made Patent and the Seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, this twenty-fifth day of August in the year of our Lord One thousand nine hundred and one, and of the Independence of the United States, the one hundred and twenty sixth.

By the President: William McKinley, By F. M. McKean, Secretary, C. H. Bush, Recorded of the General Land Office. (Seal.)

Recorded Vo. 82, p. 447.

[fols. 19-24] EXHIBIT 2 TO PETITION

COURTESY NOTICE

Anadarko, Oklahoma, October 4, 1948.

Dear Friend:

The County Assessor lists the following assessments in your name on the 1947 tax roll:

Real Estate tax: South Cement Twp.	
Und. 1/3 Int. SE¼ SW¼ & SW¼ SE¼ 3-5-9	9.57
Und. 1/3 Int. N½ NE¼ 10-5-9	11.76
	21.33

The tax rolls shows the 1947 tax in the sum of $21.33 unpaid. If this property belongs to you, it would be to your advantage to pay this tax as the delinquent list was advertised Oct. 1, 1948. Additional costs will accrue at that time. Sale will be Nov. 1st, 1948.

Yours truly, Vernie Bailess, County Treasurer.

[fol. 25] IN THE DISTRICT COURT IN AND FOR CADDO COUNTY, STATE OF OKLAHOMA

[Title omitted]

TEMPORARY RESTRAINING ORDER—October 15, 1948

Now on this 15th day of October, 1948, came on for hearing the application and verified petition of the plaintiff, Juana Paukune, in the above entitled cause, requesting the court to issue a temporary restraining order against Vernie Bailess, County Treasurer of Caddo County, Oklahoma, restraining him from selling the following described lands for ad valorem taxes at the November 1, 1948, tax sale as advertised by the County Treasurer, to-wit:

An undivided 1/3 interest in and to the Southeast Quarter of Southwest Quarter (SE¼ SW¼) and Southwest Quarter of Southeast Quarter (SW¼ SE¼)

Sec. 3, and North Half of Northeast Quarter (N½ NE¼) of Sec. 10, Township 5 North, Range 9 West, Caddo County, Oklahoma, containing 160 acres.

and it appearing to the court from said verified petition that the above described lands are not taxable for ad valorem taxes and that said order should be issued.

It is therefore ordered, adjudged and decreed by the court that Vernie Bailess, the County Treasurer of Caddo County, Oklahoma, his agents, servants and employees, be and are hereby restrained from selling the above described [fol. 26] lands at tax sale beginning November 1, 1948, or any date thereafter, as advertised, until further orders of this court.

The Sheriff of Caddo County, Oklahoma, is directed to serve a certified copy of this order upon the said Vernie Bailess, County Treasurer of Caddo County, Oklahoma, along with the summons.

This temporary restraining order is set for hearing on the 16 day of Nov. 1948, at ten o'clock A. M. in the district courtroom of Caddo County, Oklahoma, to determine whether or not a temporary injunction shall be issued.

L. A. Wood, District Judge.

SHERIFF'S RETURN

Received this writ on Oct. 15, 1948 and served a true and correct copy thereof to Vernie Bailess, Co. Treas., of Caddo Co. Okla. on Oct. 19, 1948 in Caddo County, Okla.

F. V. Yount, Sheriff, Curtis Williams, Undersheriff.

Serv. & Return .75.

(Endorsed): Filed Oct. 23 1948 Russell Glass, Court Clerk, By F. R. Harrison, Jr., Deputy. Recorded in J. 55, P. 297.

[fol. 27] IN THE DISTRICT COURT OF CADDO COUNTY, OKLAHOMA

[Title omitted]

ANSWER—Filed January 4, 1949

Comes now the defendants above named and allege and state that for answer to the petition herein filed that they deny each and every material allegation therein contained, except for those hereinafter specifically admitted.

Defendants admit that Juana Paukune is the owner of an undivided One Third (1/3) interest in the following described Real Estate, to-wit:

> Southeast Quarter of Southwest Quarter (SE¼ SW¼) and Southwest Quarter of Southeast Quarter (SW¼ SE¼) Sec. 3, and North Half of Northeast Quarter (N½ NE¼) *fo* Sec. 10, Township 5 North, Range 9 West of I. M. containing 160 acres,.

But defendants specifically deny that Juana Paukune is of Indian blood or that Juana Paukune appears on the rolls as a restricted Indian, and for further answer defendants allege that in the decree determining the heirs of the *s*llottee Paukune it was determined that Juana Paukune was of [fols. 28-31] Spanish blood.

Defendants specifically deny that the interest of the said Juana Paukune is non-taxable.

Wherefore; having fully answered defendants asks that the petition of the plaintiff herein be dismissed at the cost of the plaintiff.

> Vernie Bailess, Co. Treasure-, W. B. Coleman, Co. Assessor, Ted A. Jones, Co. Commissioner, Frank Duncan, Co. Commissioner, George Dixon, Co. Commissioner, By: Brewster McFadyen, County Attorney for Caddo County Oklahoma.

And, thereafter, on the 7th day of January, 1949 in said Court and numbered cause the Court Clerk had the following entry in his Minute Records:

IN THE DISTRICT COURT IN AND FOR CADDO COUNTY, STATE OF OKLAHOMA

No. 15445

JUANA PAUKUNE, Plaintiff,

vs.

VERNIE BAILESS, County Treasurer of Caddo County, Oklahoma, et al., Defendants

"Permission to file Answer out of Time".

[fol. 32] By the Court: Let the record show it is satisfactory with both parties that the son of Mrs. Juana Paukune, Jose Paukune, is authorized to act as interpreter for Juana Paukune, the plaintiff herein, because she speaks very broken English. Thereupon,

THE OPENING STATEMENT ON BEHALF OF JUANA PAUKUNE, PLAINTIFF HEREIN WAS MADE BY MR. J. F. HATCHER

Mr. Hatcher: I would like for the record to show no reply has been filed in this case but the Court may consider a general denial as filed to the answer of the defendants herein.

By the Court: Alright, Sir.

Your Honor, the plaintiff, Juana Paukune, filed a suit in here on October 15th, 1948 against the County Treasurer, the County Assessor and the Board of County Com-
[fol. 33] missioners of Caddo County, Oklahoma, and she alleged in her petition that she was the owner of the beneficial interest in and to an undivided one-third interest in

> The Southeast Quarter of the Southwest Quarter and the Southwest Quarter of the Southeast Quarter of Section 3, and the North Half of the Northeast Quarter of Section 10, Township 5 North, Range 9 West of the Indian Meridian, containing 160 acres,

as evidenced by a certificate called a trust patent, No. 951, issued on the 25th day of August, 1901 by William McKinley, the President of the United States, and that the patent is recorded in Volume 82 at Page 447 of the records

of the General Land Office of the United States; a copy of that was attached to the petition and that the trust period mentioned in the trust patent has been extended pursuant to law and the land is being held in trust for the benefit of the plaintiff, wife of Paukune who died on or about 1919—the records will show the exact date of his death. The plaintiff inherited an undivided one-third interest in the allotment; that the United States possesses a supervisory control over the land for the sole use and benefit of the allottee and his heirs throughout the original or any extended period of restriction.

And the plaintiff alleges in her petition under Title 25 USCA 348 provides that at the expiration of the trust period the United States will convey the land by patent to said Indian or his heirs in fee discharge of said trust and free of all charge and encumbrances whatsoever and that the trust period has not expired and the lands are non-[fol. 34] taxable under the laws of the United States, no patent has been issued, there is no fee simple patent, and the Caddo County Assessor illegally assessed these lands for the year 1947 in the sum of $21.33 and the assessment is illegal and without authority of law and the defendant County Treasurer of Caddo County, Oklahoma has extended the same on the tax rolls and shows the 1947 ad valorem taxes in the amount of $21.33 assessed against this land. The County Treasurer has advertised the land for sale on November 1, 1948 and they were going to be sold unless restrained and a temporary order was issued in this case to prevent the sale until such time as it could be heard.

Now, most of the evidence in this case is documentary evidence and the evidence will sustain these allegations as facts here. It is the contention of the plaintiff that when Paukune died that it did not effect his land at all so far as restrictions are concerned. The facts in this case will probably be all agreed upon. There is probably no contention or disagreement as to the facts, but the evidence will show here that when Paukune died that he left a will and he bequeathed, or rather devised under the terms of his will a one-third interest in this property to his wife, Juana Paukune, and a two-thirds interest to his son born of their marriage, Jose Paukune. That will was admitted

to probate. It was approved by the Secretary of the Interior pursuant to law and it was admitted to probate as shown by the records of Caddo County and the records we have here will be from the Indian Agency here.

By the Court: The Southern Plains Agency of Anadarko.

Mr. Hatcher: The Southern Plains Agency is one having charge and custody of records and one of the representa-
[fol. 35] tives from that Agency is here and brought these records in Court here at the request of the parties.

By the Court: There is no objection to any of those?

By Mr. McFadyen: No, sir.

By Mr. Hatcher:

I think when we show this is still in trust, no fee simple patent has issued, that this land is restricted and non-taxable by the State of Oklahoma. That is about the only statement I believe I will make.

Thereupon,

THE OPENING STATEMENT ON BEHALF OF DEFENDANTS WAS MADE BY MR. BREWSTER MCFADYEN

Mr. McFadyen: To the petition of plaintiff the County Treasurer of Caddo County and the Board of County Commissioners on behalf of Caddo County filed this answer, your honor: (Reads from Answer)

"Comes now the defendants above named and allege and state that for answer to the petition herein filed that they deny each and every material allegation therein contained, except for those hereinafter specifically admitted".

I am going to omit the description.

"But defendants specifically deny that Juana Paukune is of Indian blood or that Juana Paukune appears on the rolls as a restricted Indian, and for further answer defendants allege that in the decree determining the heirs of the allottee Paukune it was determined that Juana Paukune
[fol. 36] was of Spanish blood.

Defendants specifically deny that the interest of the said Juana Paukune is non-taxable.

Wherefore, having fully answered, defendants ask that the petition of the plaintiff herein be dismissed at the cost of the plaintiff".

Your Honor, in this case we expect the testimony to be pretty much as follows: This land was allotted to Pau-kune, otherwise known as Big Whip. The majority of the people remember him under that name; that Paukune died approximately in 1919, left surviving him his wife; that a hearing was had for the purpose of proving his will and distributing his estate; that the plaintiff appeared at the hearing; she was asked the question if she was of Indian blood and at that time she said, "No, not any. I am a Mexican". That as a result of this hearing the Secretary of the Interior made his finding in 1920; that our contention is under the law the one-third interest became taxable at that time; that she was not among the class of persons who are exempt from the payment of taxation. It is only the one-third interest of Juana Paukune the County is attempting to tax. They are not attempting to tax the other two-thirds of this real estate.

Jim, I think we can stipulate these are exact copies of the original?

Mr. Hatcher: Alright.

Mr. McFadyen: I imagine we will stipulate to them as we introduce them?

Mr. Hatcher: Alright.

[fol. 37] STIPULATION REGARDING CERTAIN EXHIBITS, PHOTOSTATIC COPY OF TRUST PATENT, AND COPY OF REPORT OF EXAMINER OF INHERITANCE OF OCTOBER 23, 1919

By Mr. Hatcher: Plaintiff introduces in evidence what the Reporter has marked as Plaintiff's Exhibit 1, which is a photostatic copy of the Trust Patent, No. 951, which is issued to PAU-KUNE, an Apache Indian, residing in the Kiowa, Comanche and Apache Reservation, signed by William McKinley, President of the United States, and dated in 1901.

Mr. McFadyen: Defendants stipulate a true and exact copy may be introduced in evidence.

By the Court: Let it be admitted.

Mr. Hatcher: We also have the original of that which we present to the Court.

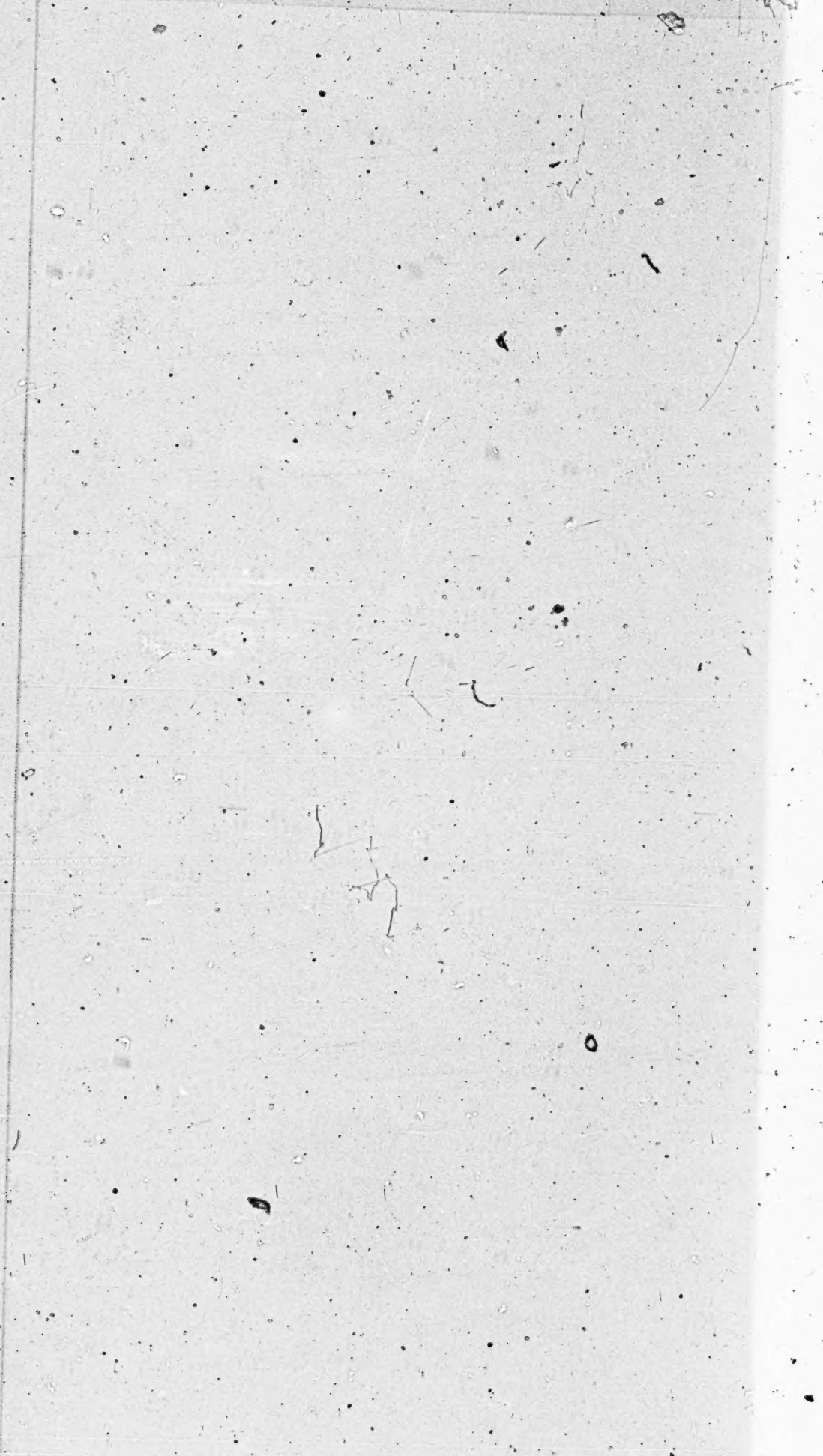
(Plaintiff's Exhibit 1, being photostatic copy of Trust Patent No. 951, as introduced in evidence, is attached to the original of this Case Made and made a part hereof.)

Mr. Hatcher: The plaintiff introduces in evidence Plaintiff's Exhibit 2, which is a transcript of proceedings on the Will of Pau-kune, and which is presented here to this Court by the Southern Plains Agency, and we ask leave of the Court to withdraw this transcript and ask the Reporter to make a copy of it and substitute a copy of it in this record so we can deliver the original back to the agency.

By Mr. McFadyen. It is so stipulated that it may be introduced.

(A full, true and complete copy of Plaintiff's Exhibit 2 as introduced in evidence is attached and made a part of part of this Case Made, the original having been withdrawn by permission of the Court.)

(Here follows 1 Photo, folio 38)



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PLAINTIFF'S EXHIBIT 1

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The United States of America,

To all to whom these presents shall come, GREETING.

Whereas, There has been deposited in the General Land Office of the United States a schedule of allotments of land, dated May 11. 1901 from the Commissioner of Indian Affairs, approved by the Secretary of the Interior, May 11. 1901 whereby it appears that under the provisions of the sixth section of the Act of Congress approved June 6. 1900 (31 Stats., 672), Pau-kune an Apache Indian residing on the Kiowa, Comanche, and Apache Reservation has been allotted the following-described land, viz: The South East quarter of the South West quarter. The South West quarter of the South East quarter of Section three. and the North half of East quarter of Section ten. in Township Five of Range nine West of the Indian Meridian in Oklahoma. containing one hundred and sixty acres.

Now know ye, That the United States of America, in consideration of the premises and in accordance with the provisions of the fifth section of the Act of Congress of February 8. 1887 (24 Stats., 388), **HEREBY DECLARES** that it does and will hold the land thus allotted, subject to all the restrictions and conditions contained in said fifth section as modified by the fifth article of the agreement ratified by said sixth section of the Act of June 6. 1900, for the period of twenty-five years, in trust for the sole use and benefit of the said Pau-kune or in case of his decease, for the sole use of his heirs, according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever.

In testimony whereof, I, William McKinley President of the United States of America, have caused these Letters to be made Patent and the Seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, this twenty-fifth day of August, in the year of our Lord one thousand nine hundred and one and of the Independence of the United States, the one hundred and twenty-sixth.

By the President: William McKinley

By J. M. McKee, Secretary.

Recorded Vol. 447

Recorder of the General Land Office.

[fol. 39] PLAINTIFF'S EXHIBIT 2

Triplicate

Will of Pau-kune, Kiowa Agency, Okla.

Kiowa Agency, Anadarko, Okla.

October 23, 1919.

C. F. Stinchecum, Superintendent, Anadarko, Okla.

My dear Mr. Stinchecum:

Inclosed herewith find papers in the matter of determining the heirs and pertaining to the Will of Pau-Kune, deceased APache Allottee No. 951.

It appears that under date of March twelfth, 1919, the decedent made a Will whereby he bequeathed 1/3 of his allotment to his wife Juana Pau-kune, and 2/3 of his allotment to his son Jose Pau-kune.

It further appears that he bequeathed the sum of $5.00 to Arthur Cruz, who is a son of Juana Pau-kune by a prior marriage. It further appears that the decedent bequeathed and devised the residue of his estate in equal shares to Juana Pau-kune, wife, and Jose Pau-kune, son.

It appears from the testimony adduced at the hearing that the decedent was of stout mind and disposing memory at the time his Will was made, that the Will was interpreted to him in the Spanish language, and that he thoroughly understood the contents thereof. It further appears that no undue influence was brought to bear upon the decedent to cause him to devise and bequeath his property as he did.

Juana Pau-kune, wife of the decedent, raises no objection to the approval of the Will.

It is suggested that you ask the Office to make this case special and that a special slip be attached to the case. You are no doubt aware that there is Oil production on this allotment and any funds that may accrue cannot be disbursed until the heirs are determined or the Will approved.

These papers are submitted to you for whatever action you, may see fit to take in regard to the approval or disapproval of the Will of the decedent.

Very truly yours, Examiner of Inheritance.

WLW/EC

[fols. 40-50] Estate and Will of Pau-kune, Kiowa Agency, Okla.

Kiowa Agency, Anadarko, Oklahoma.

October 23, 1919.

Commissioner of Indian Affairs, Washington, D. C.
Sir:

Inclosed herewith find papers in the matter of determining the heirs and pertaining to the Will of Paukune, deceased Apache allottee No. 951.

Notices in this matter were sent out on September 11, 1919, for a hearing to be held at the Kiowa Agency, Anadarko, Oklahoma, on October 22, 1919. Juana Pau-kune was appointed guardian ad litem for Jose Pau-kune, and Arthur Cruz, minors.

Notices were posted at five different places on the Kiowa Reservation thirty days prior to the date of the hearing.

It appears that the decedent made a Will under date of March 12, 1919, the original and one copy of such Will are inclosed herewith.

None of the parties testifying knew anything in regard to the marriage of the decedent to Tschase-chu, deceased Apache allottee No. 538, but the Register of Indian Families shows them to have been husband and wife, and the heirs of Tschase-chu were determined under date of October 11, 1909, and found to be as follows: (76214-09)

Pau-kune, husband ½

Chah-le-mah, dau. ½

The Register of Indian Families shows the father of Cha-le-mah to have been Dah-zane-ah-teel-chy.

It appears from the evidence adduced that Jose Paukune was the only descendant of the decedent.

The Will of the decedent has this day been submitted to the Superintendent for whatever action he may see fit to take in regard to the approval or disapproval thereon.

Very truly yours, Examiner of Inheritance.

WLW/FC

[fol. 51] TESTIMONY OF JUANITA OR JUANA PAU-KUNE, IN THE MATTER OF DETERMINING THE HEIRS OF PAU-KUNE, DECEASED APACHE ALLOTTEE NO. 951.

STATE OF OKLAHOMA,
Caddo County, ss:

JUANITA OR JUANA PAU-KUNE after being duly sworn testifies as follows:

Q. What is your name?
A. Juanita or Juana Pau-kune.
Q. How old are you?
A. 40 years old.
Q. What is your post office address?
A. Cement, Oklahoma.
Q. How long have you lived in Oklahoma?
A. 13 years.
Q. Have you any Indian blood if so how much and of what tribe?
A. No, I am a Mexican.
Q. Did you know a person by the name of Pau-kune?
A. Yes.
Q. How was he related to you?
A. He was my husband.
Q. When did Pau-kune die?
A. On Friday, April 4, 1919.
[fol. 52] Q. How old was Pau-kune at the time he died?
A. I don't know his age.
Q. Where did Pau-kune die?
A. On his own allotment.
Q. Had Pau-kune improved this allotment and established a homestead there?
A. Yes.
Q. Are you now living on the allotment of Pau-kune?
A. Yes I have been living there since his death. Pau-kune and myself lived on this allotment about 4 years before he died.
Q. How many times was Pau-kune married?
A. I do not know of any other marriage than to myself.
Q. Then how and where were you and Pau-kune married?
A. July 24, 1911, by ceremony in Oklahoma, at the court house, Anadarko.

Q. Were you and Pau-kune living together as husband and wife when he died?

A. Yes.

Q. How many children did you give birth to that were begotten by Paukune?

A. One child: Jose Pau-kune, son, living, age 7 years.

Q. Did Pau-kune ever have any children by any other woman than yourself?

A. No.

Q. Did Pau-kune ever have any adopted children?

A. No.

Q. Who is Arthur Cruz?

A. He is a son of Frank Cruz, and myself.

[fol. 53] Q. Were you ever married before you married Pau-kune?

A. Yes I was married one time.

Q. Who was your first husband?

A. Frank Cruz.

Q. When how and where were you and Frank Cruz married?

A. About 1908 by ceremony at Toreson, Mexico.

Q. When how and where were you and Frank Fruz separated?

A. By the death of Frank Cruz on June 12, 1911.

Q. Who was the father of Pau-kune?

A. Simon Diaz. I do not know the exact date of his death, but he died before the death of Pau-kune.

Q. Who was the mother of Pau-kune?

A. Ynosente, who died before Paukune but I do not know the exact date of her death.

Q. When how and where were Simon Diaz and Ynosente married?

A. Before the birth of Pau-kune by ceremony at Chihuahua, Mexico.

Q. Did Pau-kune make a will?

A. Yes.

(Will read by Examiner and translated by Interpreter.)

Q. You have heard the will of the decedent read and translated do you object to the approval thereof?

A. I raise no objections to the approval of the will.

Q. Was Pau-kune of sound mind and disposing memory at the time he made this will?

A. Yes.

[fol. 54] Q. Did anyone unduly influence Pau-kune to cause him to make the will?

A. No he made it of his own free will.

Q. Did Pau-kune have any personal property held in trust by the Government at the time he died?

A. Nothing but money on deposit.

Q. Do you claim an interest in the estate of Pau-kune?

A. Yes.

(Signed) Juanita.

I John Rivaz do solemnly swear that I can speak both the Spanish and English languages and that I have well and truthfully interpreted the foregoing testimony to the best of my knowledge and ability.

(Signed) John Rivaz, Interpreter.

Subscribed and sworn to before me at Anadarko, Oklahoma, this 22nd day of October 1919.

(Signed) Warner L. Wilmeth, Examiner of Inheritance.

Name: Juana Pau-kune.

Age: 40 years.

Address: Cement, Oklahoma.

Tribe: Mexican (Unallotted).

Means of knowledge: Good being the last wife of the decedent Interest in case: Heir.

Examiner's impression of intelligence and credibility of witness: Does not speak English. Is intelligent and appears to be truthful.

[fol. 55] TESTIMONY OF SA-TA-RO ROACHE, IN THE MATTER OF DETERMINING THE HEIRS OF PAU-KUNE DECEASED APACHE ALLOTTEE NO. 951.

STATE OF OKLAHOMA,
Caddo County, ss:

SA-TA-RO ROACHE after being duly sworn testifies as follows:

Q. What is your name?
A. Sa-ta-ro Roache.
Q. How old are you?
A. 30 years old.
Q. What is your post office address?
A. Anadarko, Oklahoma.
Q. How long have you lived in Oklahoma?
A. I was born and raised here.
Q. Have you any Indian blood if so how much and of what tribe?
A. One fourth Comanche and three fourths Mexican.
Q. Did you know a person by the name of Pau-kune?
A. Yes.
Q. How long did you know him?
A. About 20 years.
Q. When did Pau-kune die?
A. April 4, 1919.
Q. How old was he when he died?
A. Between 80 and 90 years old.
[fol. 56] Q. Where did Pau-kune die?
A. On his allotment.
Q. Had he established a homestead on his allotment?
A. Yes.
Q. Is his wife Juana Pau-kune now living on this allotment?
A. Yes.
Q. How many times was Pau-kune married?
A. I only know of one marriage and that was to Juana Pau-kune.
Q. When how and where were Pau-kune and Juana Pau-kune married?
A. In 1911, by ceremony at Anadarko, Oklahoma.

Q. Were Pau-kune and Juana Pau-kune living together as husband and wife when he died?

A. Yes.

Q. How many children did Juana Pau-kune give birth to that were begotten by Pau-kune?

A. One child: Jose Pau-kune, son, living, age 7 years.

Q. Did Pau-kune have any children by any woman other than Juana Paukune, or any adopted children?

A. No.

Q. Was Juana Paukune ever married before she married Pau-kune?

A. Yes she was married to Frank Cruz who died in June, 1911.

Q. Who is Arthur Cruz?

A. He is a son of Frank Cruz and Juana Pau-kune.

Q. Did Pau-kune made a will?

A. Yes.

Q. Were you present at the time this will was made?

A. Yes.

[fol. 57] Q. Could Pau-kune speak any English?

A. No.

Q. What language did he speak?

A. The Spanish.

Q. Who interpreted the will to him?

A. I did.

Q. Did he thoroughly understand the contents of the will?

A. Yes.

Q. Was Pau-kune of sound mind and disposing memory at the time this will was made?

A. Yes.

Q. Did anyone unduly influence him to cause him to make the will?

A. No.

Q. Who else were present at the time this will was made besides yourself?

A. My father Benjamin Roache, John Rivaz, and Mr. Carswell. His wife Juana Pau-kune was present also.

Q. Do you claim an interest in the estate of Pau-kune?

A. No.

(Signed) Satara Roache.

Subscribed and sworn to before me at Anadarko, Oklahoma, this 22nd day of October 1919.

(Signed) Warner L. Wilmeth, Examiner of Inheritance.

[fol. 58] Witness (Name as shown on allotment schedule): Sa-ta-ro.

Sex: Male.

Age (as shown on census and annuity rolls): 30 years.

Address: Anadarko, Oklahoma.

Tribe: Comanche No. 886.

Means of knowledge: Good, having known the decedent for about 20 years and acted as interpreter at the time the will was made.

Interest in case: None.

Examiner's impression of intelligence and credibility of witness: excellent. Speaks English Fluently. Is intelligent and appears to be truthful.

[fol. 59] TESTIMONY OF BENJAMIN ROACHE, IN THE MATTER OF DETERMINING THE HEIRS OF PAU-KUNE, DECEASED APACHE ALLOTTEE No. 951.

STATE OF OKLAHOMA,
Caddo County, ss:

BENJAMIN ROACHE after being duly sworn testifies as follows:

Q. What is your name?
A. Benjamin Roache.
Q. How old are you?
A. About 80 years old.
Q. What is your post office address?
A. Anadarko, Oklahoma.
Q. How long have you lived in Oklahoma?
A. Over 30 years.
Q. Have you any Indian blood if so how much and of what tribe?
A. I am a Mexican.

Q. Did you know a person by the name of Pau-kune?
A. Yes.
Q. Did you know a person by the name of Paü-kune?
A. Yes.
Q. How long did you know him?
A. About 30 years.
Q. When did Pau-kune die?
A. He died this last spring.
Q. How old was he when he died?
A. He was a very old man but I don't know just how old he was.

[fol. 60] Q. Where did Pau-kune die?
A. On his own allotment?
Q. Had he established a homestead on his allotment?
A. Yes.
Q. Does Juana Pau-kune his wife live on this allotment now?
A. Yes.
Q. How many times was Pau-kune married?
A. I only know of two marriages.
Q. Who was the first wife of Pau-kune?
A. I don't know her name she was an Apache woman and died before allotment.
Q. When how and where Pau-kune and this Apache woman married?
A. Before allotment by Indian custom.
Q. When and how were they separated?
A. By the death of the Apache woman.
Q. Did Pau-kune have any children by this Apache woman?
A. Not that I know of.
Q. Who was the second wife of Pau-kune?
A. Juanita or Juana Pau-kune.
Q. When how and where were Pau-kune and Juanita or Juana Pau-kune married?
A. In 1911 by ceremony at Anadarko, Oklahoma.
Q. Were Pau-kune and Juanita or Juana Pau-kune living together as husband and wife at the time he died?
A. Yes.

[fol. 61] Q. How many children did Juanita or Juana Pau-kune give birth to that were begotten by Pau-kune?

A. One child: Jose Pau-kune, son, living, age 7 years.

Q. Did Pau-kune have any other children than Jose Pau-kune?

A. No.

Q. Did Pau-kune ever adopt any children?

A. I don't think he did.

Q. Was Juanita or Juana Pau-kune ever married before she married Pau-kune?

A. Yes she was married one time and then to Frank Cruz. Frank Cruz died sometime in June 1911.

Q. Who is Arthur Cruz?

A. He is a son of Frank Cruz and Juanita or Juana Pau-kune.

Q. Did Pau-kune made a will?

A. Yes.

Q. Who interpreted at the time this will was made?

A. My son, Sa-ta-ro Roache.

Q. Were you present at the time this will was made?

A. Yes.

Q. Did you hear the will interpreted to Paukune?

A. Yes.

Q. Did he thoroughly understand the contents of the will?

A. Yes.

Q. What language did Pau-kune speak?

A. He spoke the Spanish language.

Q. Was Pau-kune of sound mind and disposing memory at the time he made this will?

A. Yes.

[fols. 62-64] Q. Did anyone unduly influence Pau-kune to cause him to make this will?

A. No. He made it of his own free will.

Q. Do you claim any interest in the estate of Pau-kune?

A. No.

Witnesses to mark:

Warner L. Wilmeth (Signed) Examiner of Inheritance.
Benjamin Roache His (Finger print) mark.

Subscribed and sworn to before me at Anadarko, Oklahoma, this 22nd day of October 1919.

(Signed) Warner L. Wilmeth, Examiner of Inheritance.

Witness (Name as shown on allotment schedule): Benjamin Roach.

Sex: Male.

Age (As shown on census and annuity rolls): 64 years.

Address: Anadarko, Oklahoma.

Tribe: Comanche No. 882.

Means of knowledge: Good, having known the decedent for about 30 years.

Interest in case: None.

Examiner's impression of intelligence and credibility of witness: Good. Speaks English but does not sign his name. Is intelligent and appears to be truthful.

[fol. 65] WILL OF PAU-KUNE

Apache No. 951

I, Pau-kune, of Lawful age, of Cement, Caddo County, Oklahoma, do hereby make, publish and declare this my last will and Testament, in manner and form following:—

First:

I direct that all my Just debts and funeral expenses be paid as soon after my decease, as conveniently can be done.

Second:

I give, devise and bequeath to my son, Jose Pau-kune, an undivided two-thirds (2/3) interest in and to the following described real estate situate in Caddo County, Oklahoma, to-wit: The south east quarter of the south west quarter (SE/4 of SW/4) and the south west quarter of the south east quarter (SW/4 of SE/4) of section Three (3) and north half of the north east quarter (N/2 of NE/4) of section Ten (10) in Township Five (5) north of range Nine (9) west of the Indian Meridian in Oklahoma, containing one hundred and sixty acres to have and to hold the same to him absolutely and forever.

Third:

I give, devise and bequeath to my wife Juana Pau-kune an undivided one-third (1/3) interest in and to the follow-

ing described real estate situate in Caddo County, Oklahoma, to-wit: The south east quarter of the south west quarter (SE/4 of SW/4) and the south west quarter of the southeast quarter (SW/4 of SE/4) of section three (3) and the north half of the north east quarter (N/2 of NE/4) of section Ten (10) in Township Five (5) north of range Nine (9) west of the Indian Meridian in Oklahoma, containing one hundred and sixty acres, to have and to hold the same to her absolutely and forever:

Fourth:

I give and bequeath to Arthur Cruz, the sum of Five (5) dollars.

Fifth:

All the rest, residue and remainder of my estate, real, personal and mixed wheresoever situate, of which I may die seized or possessed, or to which I may be entitled at the time of my decease, I give, devise and bequeath to my wife Juana Pau-kune and to my son Jose Pau-kune, share and share alike to have and to hold the same to them absolutely and forever.

[fols. 66-69] Sixth:

It is my wish that my family live upon and occupy the land hereinabove described as their home until my son Jose shall become of age.

Seventh:

I hereby revoke all former wills, heretofore made by me.

In witness whereof I have hereunto subscribed my name at my farm near Cement in Caddo County, Oklahoma, this Twelveth day of March A. D. 1919, in the presence of Satar-ro Roach, Ben Roach and C. H. Carswell whom I have requested to become attesting witnesses hereto.

Pau-Kune His X Mark.
Witness to mark:

At the request of the said Pau-kune I wrote his name and witnessed his mark.

(Signed) C. H. Carswell.

The foregoing instrument was subscribed, published and declared by Pau-kune as and for his last Will and Testament, in our presence and in the presence of each and all of us, and we, at the same time, at his request, in his presence and in the presence of each other, hereunto subscribe our names and residences as attesting witnesses this twelvth day of March A. D. 1919.

His Ben X Roach Mark.

Resds, Anadarko, Okla.

At the request of Ben Roach I *Rot* his name *en* wytnessed his mark.

Signed: John Rivaz, Anadarko, Okla.

Signed: Satero Roach, Anadarko, Okla.
Signed: C. H. Carswell, Anadarko, Oklahoma.

[fol. 70] Thereupon, all witnesses were called and oath administered, and Jose Paukune, acting as interpreter for Juana Paukune was sworn as follows:

By the Court: Do you swear you are to translate into Spanish to the witness questions propounded by counsel and to translate the answer of the witness from Spanish into English to the best of your ability, so help you God?

By Jose Paukune: I do.

Thereupon, JUANA PAUKUNE having been first duly sworn, was called to the witness stand on her own behalf, and testified as follows through her interpreter, Jose Paukune:

Direct examination.

By Mr. Hatcher:

Q. Tell her to state her name to the Court?
A. Juana Paukune.
Q. How old is she?
A. She says she is around 64 or 65. She can't remember her age.
Q. Where does she live at this time?

A. She lives at Chickasha, Oklahoma. 1101 Choctaw, residing there at the time.

Q. Are you the surviving wife of Pau-kune?

A. She is.

Q. When did you come to the United States?

A. She don't remember. It was back in the Indian Territory.

[fol. 71] Q. Ask her where she was born?

A. She was born in Durango, Republic of Mexico.

Q. Who was her father?

A. Robert Martinez. He was Indian.

By Mr. McFadyen: Comes now the defendant and moves the Court to strike the last three words of the answer in which she stated "He was Indian" for the reason that at the hearing held for the purpose of determining the heirs, probating the Will of Pau-kune, this plaintiff was asked the question if she was Indian and the reply to that question: "No, not Indian. I am Mexican". Based on the testimony at that time the Secretary of the Interior made his Order as to all matters. That Order is conclusive and binding upon all parties, has the effect of a judicial finding.

Mr. Hatcher: His finding as to heirs is conclusive, but not as to blood or quantum of blood.

By the Court: I am going to let the witness testify. I am going to take this case under advisement anyway. Let the witness testify and give him an exception.

Q. Do you know what Tribe of Indian- your father belonged to?

Mr. McFadyen: Now my same objection applies to this question.

By the Court: Yes, sir.

A. No she don't want to say what Tribe. She says the Tribe of Indians they do, you know, they have Tribes in Mexico the same as in the United States. She could not say whether it was Aztec, Mayo or what.

[fol. 72] Q. Have you ever requested the United States Government through its Indian Agency to give you a fee simple patent to your land?

A. She has never applied for a patent in fee.

By Mr. Hatcher: Your Honor, it is stipulated at this time between counsel for the plaintiff and defendants that the Trust period covering this particular allotment has been extended from time to time and is still in full force and effect.

By Mr. McFadyen: As to that stipulation is to the land and not to the individuals. We will not stipulate she is an Indian and restricted but we will stipulate this land was issued what they call a trust patent and that this patent has been extended for an additional twenty-five years.

By Mr. Hatcher: And is being held under that extension in trust at this time.

By Mr. McFadyen: As to the Indian?

By Mr. Hatcher: As to the land.

By Mr. McFadyen: Jim, I don't think it is to her, whether she had a fee simple patent.

By Mr. Hatcher: I am not trying to stipulate anything except——

By Mr. McFadyen: Can we word that a little different?

By Mr. Hatcher: Here is what we will stipulate—we will not stipulate on the law. This patent provides—this trust patent—that for a period of twenty-five years that the United States of America does hold the land subject to all restrictions as modified by agreement for said Pau-kune, [fol. 73] or in case of his decease for the sole use of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever."

By Mr. McFadyen: And that period has been extended for a period of twenty-five years.

By Mr. Hatcher: That period has been extended for a period of twenty-five years for whatever it means, and we also stipulate there has never been a fee simple patent or final patent issued to either Pau-kune or his heirs.

By Mr. McFadyen: Yes, sir, that is right.

Mr. Hatcher: I believe that is all I will ask, Mrs. Paukune.

Mr. McFadyen: I have no questions.

(Witness excused.)

Thereafter, JOSE PAUKUNE having been first duly sworn to testify the truth, and nothing but the truth, was called on behalf of the plaintiff, and testified as follows:

Direct examination.

By Mr. Hatcher:

[fol. 74] Q. You are José Paukune? Is that right?
A. Yes, sir, that is right, I am Jose Paukune.
Q. Where do you live, Mr. Paukune?
A. Chickasha, Oklahoma, 1111 Minnesota Avenue.
Q. How old are you?
A. Thirty-seven years.
Q. How much education do you have?
A. Oh, equivalent to high school education.
Q. Do you have a family?
A. I do. One boy.
Q. You own what interest in this 160 acres of land involved here through your father's allotment?
A. Two-thirds interest.
Q. And are you in charge of it yourself or who is in charge of operating your two-thirds interest? In other words, who is running your business for you?
A. Well, I try to run it with the supervision of the Department, though.
Q. Do they lease and control your part of this allotment?
A. Yes, sir.
Q. You can't do anything without, or can you, without permission of the Indian Department?
A. That is right.
Q. The Secretary of Interior or his agents?
A. That is right.
Q. Have you requested a patent on your two-thirds?

A. I have never asked for a patent.

Q. Never asked for a patent in fee?

A. No, sir.

[fol. 75] Q. This property—is it producing oil property?

A. Yes, sir.

Q. And your two-thirds interest is an undivided two-thirds interest?

A. That is right.

Q. Do you feel that it is to a better advantage to operate the whole 160 acres as a unit rather than to divide the land or have you given that any thought?

A. Yes, I have given it thought lots of times but I brought it up with the Agency officials; nothing has been done to try to divide it. They some times refer back to the will—that I was supposed to get two-thirds; mother was to get one-third.

Q. That is the way it is handled now?

A. That is the way it has been handled all of these previous years up until now.

Q. Is this land, this oil and gas lease being operated under a departmental oil and gas lease?

A. Yes, sir.

Mr. Hatcher: I believe that is all.

Cross-examination.

By Mr. McFadyen:

Q. Were you granted the privilege of leasing of your land?

A. Yes, sir.

Q. You make the lease and they approve it?

A. I make the lease. It has to meet their approval.

Q. They have certain requirements?

A. That is right—certain regulations.

(Witness excused.)

[fol. 76] OFFERS IN EVIDENCE

By Mr. Hatcher: We offer in evidence, under stipulation of counsel plaintiff's Exhibits Number 3 and 4. On August 21st, 1948 the County Treasurer mailed this cart to Juana Paukune: (Reads Exhibit 4.)

(A full, true and complete copy of Exhibit 4, as introduced and read by counsel is as follows:)

Anadarko, Okla., Aug. 21, 1948.

(Courtesy Notice)

Dear Friend:

The County Assessor lists the following assessments in your name on the 1947 tax roll;

Real Estate tax: South Cement Twp.
Und. 1/3 Int. SE¼ SW¼ & SW¼ SE¼ 3-5-9
Und. 1/3 Int. N½ NE¼ 10-5-9

Intangible tax: ____

The tax roll shows the 1947 tax in the sum of $19.68 unpaid. If this property belongs to you, it would be to your advantage to pay this tax before the delinquent list is advertised Oct. 1 1948. Additional costs will accrue at that time.

Yours truly, Vernie Bailess, County Treasurer.

(Last Notice)
Plf's Ex. 4 11-21-49

[fol. 77] Mr. Hatcher: Then another one on October 4th, 1948. (Reads Plaintiff's Exhibit 3.) He describes this land again and shows a total of $21.33.

(A full, true and correct copy of Plaintiff's Exhibit 3 as introduced and read by counsel is as follows:)

Anadarko, Okla. October 4, 1948.

(Courtesy Notice)

Dear Friend:

The County Assessor lists the following assessments in your name on the 1947 tax roll:

Real Estate tax: South Cement Twp.		
Und. 1/3 Int. SE¼ SW¼ & SW¼ SE¼	3-5-9	$9.57
Und. 1/3 Int. N½ NE¼	10-5-9	11.76
		21.33

The tax roll shows the 1947 tax in the sum of $21.33 unpaid. If this property belongs to you, it would be to your advantage to pay this tax as the delinquent list was advertised Oct. 1, 1948. Additional costs will accrue at that time.

Sale will be Nov. 1st, 1948.

Yours truly, Vernie Bailess, County Treasurer.

Plf's Ex. 3 11-21-49.

[fol. 78] Thereupon, JUANA PAUKUNE was re-called to the witness stand, and Jose Paukune acting as Interpreter as before, testified as follows, under oath:

Direct examination.

By Mr. Hatcher:

Q. Mrs. Paukune, have you ever sold your part of this property of your husband's allotment, your undivided one-third interest?

A. No, she says she has been under supervision of the Department subject to all of their rules and regulations.

By Mr. McFadyen: To which we object for the reason she was under supervision of the Department is a conclusion on the part of this witness.

By the Court: Overruled. Give him an exception.

Q. Mrs. Paukune, does the Indian Department collect your rents for you from the oil companies and the tenants?

By Mr. McFadyen: To which we object as being incompetent, irrelevant and immaterial.

By the Court: Overruled. Ask her the question.

A. All her rentals come to this office—the South Plains Indian Agency and the checks are drawn on the United States Treasury signed by the Superintendent, Assistant Superintendent or Deputy. She says in the past they issued orders for groceries or clothing for her, signed by them. Of course there has been issued purchase orders for clothing, groceries. They don't do that any more.

Q. Do they give her the money now?

By Mr. McFadyen: We make the same objection.

[fol. 79] A. They give her the money now, yes.

Cross-examination.

By Mr. McFadyen:

Q. Have you ever applied for citizenship in the United States?

A. No.

Q. The answer is she never has?

A. She never has.

Mr. McFadyen: Do you have any objection to stipulating she is a native of Mexico and not a citizen of the United States?

Mr. Hatcher: I would not want to stipulate on that. There are some laws on that naturalization away back there that might make her a citizen. She married a citizen up here. I would not want to stipulate on that. I am not sure but that she is a citizen. I don't think it makes any difference.

Mr. McFadyen: I do.

Mr. Hatcher: You do?

Q. What year did you marry Paukune?

A. 1911, she believes. She has the marriage certificate there.

By the Court: The record in the transcript shows July 24, 1911.

By Mr. McFadyen: That is correct, your honor.

By the Court: At Anadarko.

By Mr. McFadyen: We might stipulate, Jim, that she married Paukune on the 24th day of July, 1911 at the court house at Anadarko, Oklahoma.

[fol. 80] By Mr. Hatcher: That is satisfactory.

By Mr. McFadyen: By C. Ross Hume, County Judge, and it becomes a question of law whether she is a citizen of Mexico or of the United States. She has never applied for citizenship.

Q. Have you ever tried to draw your funds out of the Agency—for the purpose of the question—has she ever tried to with-draw her funds to supervise herself?

A. No, she never has. She has been under the supervision and regulations all of this time.

Mr. Hatcher: What did she say about trying to draw them out?

Mr. McFadyen: The answer to the question is "No".

By Mr. Hatcher: The plaintiff rests.

DEMURRER TO EVIDENCE AND ORDER OVERRULING SAME

By Mr. McFadyen: Comes now the defendants and demur to the evidence of the plaintiff for the reason that said evidence shows no grounds or reason why the injunction prayed for by the plaintiff should issue—totally fails to sustain the allegations of the plaintiff's petition and asks the Court to dismiss said petition, dissolve the temporary restraining order heretofore issued by the Court on the 15th day of October, 1948.

By the Court: Overrule the demurrer. Give him an exception.

[fol. 81] FURTHER STATEMENT OF MR. MCFADYEN AND LETTER FROM W. B. MCGOWN TO S. A. COOK OF APRIL 7, 1932

Mr. McFadyen: Your Honor, I am going to read the transcript of the proceedings first, Plaintiff's Exhibit 2. Letter to C. V. Stinchecum, Superintendent. "My dear Mr. Stinchecum: Inclosed herewith find papers in the matter of determining the heirs and pertaining to the Will of Pau-kune, deceased Apache Allottee No. 951.

It appears that under date of March twelfth, 1919, the decedent made a Will whereby he bequeathed 1/3 of his

allotment to his wife Juana Pau-kune, and 2/3 of his allotment to his son Jose Pau-kune.

It further appears that he bequeathed the sum of $5.00 to Arthur Cruz, who is a son of Juana Pau-kune by a prior marriage. It further appears that the decedent bequeathed and devised the residue of his estate in equal shares to Juana Pau-kune, wife, and Jose Pau-kune, son.

It appears from the testimony adduced at the hearing decedent made a Will whereby he bequeathed 1/3 of his at the time his Will was made, that the Will was interpreted to him in the Spanish language, and that he thoroughly understood the contents thereof. It further appears that no undue influence was brought to bear upon the decedent to cause him to devise and bequeath his property as he did.

Juana Pau-kune, wife of the decedent, raises no objection to the approval of the Will.

It is suggested that you ask the Office to make this case special and that a special slip be attached to the case. You are no doubt aware that there is Oil production on this allotment and any funds that may accrue cannot be dis- [fol. 82] bursed until the heirs are determined or the Will approved.

These papers are submitted to you for whatever action you may see fit to take in regard to the approval or disapproval of the Will of the decedent. Very truly yours, Examiner of Inheritance".

Father, Simon Diaz—I will skip that. Next (Referring to Plf.'s Exhibit 2) is Testimony by Juanita or Juana Pau-kune, signed by John Rivaz, Interpreter, and subscribed and sworn to by Warner L. Wilmeth, Examiner of Inheritance. Testimony of Sa-ta-ro Roache, which I am going to skip. It pertains to Pau-kune himself. The testimony of Benjamin Roache I am going to omit. The Notice of Hearing to Determine Heirs I will omit reading; also omit reading Will.

We now offer as Defendant's Exhibit 1 letter of Superintendent, Acting Superintendent W. B. McCown, Kiowa Indian Agency, dated April 7, 1932 to S. A. Cook, Apache, Oklahoma.

(To Mr. Hatcher) Do you have any objection to the introduction of this letter?

By Mr. Hatcher: Well, No, I don't have any objection to it, your honor. I don't think it has any binding force. I don't have any objection because it sets out the policy of the government.

Mr. McFadyen reads Defendant's Exhibit 1, a full, true and correct copy as introduced and read being as follows:

[fol. 83] DEFENDANT'S EXHIBIT 1—11-21-49

UNITED STATES—DEPARTMENT OF THE INTERIOR

Field Service—Kiowa Indian Agency

Anadarko, Okla., Apr. 7, 1932

Mr. S. A. Cook, Apache, Oklahoma

Dear Sir:

This is to refer to the allotment of Pau-kune (Big-Whip), deceased Apache allottee No. 951, described as the N/2 NE/4 Sec. 10 and SE/4 SW/4 and SW/4 SE/4 Sec. 3, all in Township 5 North, Range 9 West I. M.

The heirs to this allotment are: Jose Paukune 2/3 and Juana Paukune 1/3. Jose Paukune is a son of the allottee and, therefore, he is enrolled at this agency and classed as an Indian. Juana Paukune is the Mexican wife of the allottee and is not carried on the rolls of this agency or of any other agency.

As Juana Paukune is not an Indian, it is the policy of the Department that she be issued a patent in fee for her share in this restricted Indian land. However, it is not thought advisable to have a patent in fee issued upon her undivided 1/3 interest as this would complicate matter and cloud the title. Juana Paukune is a very hard person to deal with and has repeatedly refused to sign leases on this allotment. The Department has taken exception to this office leasing the share of non-Indian heirs in various allotments.

There are three lines of action that can be taken in this matter: One is to issue a patent in fee upon Juana Paukune's undivided 1/3 interest; another is to have this allotment partitioned and patent in fee issued upon her share;

and the other is for Jose Paukune to purchase the share of his mother, same being conveyed by restricted deed. The first line of action will be greatly dis-advantageous to all persons concerned and it is believed that one of the other two plans could be carried out. Jose Paukune has approximately ten thousand dollars to his credit here and it is believed that he could purchase his mother's share and the whole allotment would, therefore, retain its trust status.

You are, therefore, instructed to see Juana Paukune at your earliest convenience and see if she will agree to a partition or whether she desires to sell to her son, Jose. You should advise her that something must be done as the Department is unwilling to hold her share in trust any longer as she has no Indian blood.

[fol. 84] Please submit your report at an early date.

Yours respectfully, (Signed) W. B. McCown, Acting Superintendent.

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Penciled Note attached: Apa 951

This old lady is in Wesley Hospital Oklahoma City and I could not see her when she comes home we will come to the agency and get this done. S. A. Cook.
(Deft's Ex. 1) 12-21-49

[fol. 85] MEMORANDUM OF TRIAL COURT'S JUDGMENT AND FURTHER STIPULATION OF PARTIES

(To Mr. Hatcher) Jim, we can stipulate here, I am sure, that the Secretary of the Interior's decision was rendered on January 2, 1920, Probate 7440-20?

Mr. Hatcher: Yes.

By Mr. McFadyen: It is stipulated that the decision of the Secretary of Interior was issued January 2nd, 1920, Probate 7440-20 in the Matter of the Allotment and Estate Record of Pau-kune.

Mr. Hatcher: Now the decision you are talking about is the determination of the heirs and the approval of the final probate of the will?

Mr. McFadyen: Yes, sir. They cannot find their copy in this Agency.

By Mr. McFadyen: We will rest, Your Honor.

Whereupon, after the hearing of testimony and introduction of evidence and argument of counsel, judgment was entered for the plaintiff granting permanent injunction, to which defendant excepts, and exceptions were by the Court allowed.

By Mr. J. F. Hatcher: It is stipulated between plaintiff and defendants that the County Assessor has assessed this one-third interest on the tax rolls since 1947 for 1947 and the following years and the County Treasurer has extended the tax on his rolls and is attempting to collect the tax and unless he had been restrained he would have sold it.

[fol. 86] IN THE DISTRICT COURT OF CADDO COUNTY, OKLAHOMA

[Title omitted]

MOTION FOR NEW TRIAL—Filed November 21, 1949

Come now said defendants and move the court to vacate and set aside the judgment of this court rendered herein on the 21st day of November, 1949, defendants being aggrieved thereby, and to grant a new trial for the following causes which affect materially the substantial rights of said defendants.

First: Error of law occur-ing at the trial, and excepted to by the defendants.

Second: Error of the Court in overruling the demurrer to the evidence of the plaintiff.

Third: That the judgment and order of the Court is not supported by the law or the evidence, and are contrary to the law and the evidence.

[fol. 87] Frank Limerick, County Attorney of Caddo County, Okla., Attorney for the Defendants, Brewster McFadyen, Special Attorney for Defendants.

IN THE DISTRICT COURT IN AND FOR CADDO COUNTY, STATE OF OKLAHOMA

No. 15445

JUANA PAUKUNE, Plaintiff,

vs.

VERNIE BAILESS, County Treasurer of Caddo County, Oklahoma: and W. B. COLEMAN, Assessor of Caddo County, Oklahoma: and BOARD OF COUNTY COMMISSIONERS OF CADDO COUNTY, OKLAHOMA, composed of TED A. JONES, FRANK DUNCAN and GEORGE D. NIXON, Defendants.

JOURNAL ENTRY OF JUDGMENT—December 16, 1949

Now, on this 21st day of November, 1949, came on for trial the above entitled cause, pursuant to regular assignment, the plaintiff, Juana Paukune, appearing in person and by her attorneys, Hatcher & Bond, and all the defendants above named appearing by Brewster McFadyen, the [fol. 88] legally appointed attorney appearing for the County Attorney of Caddo County, Oklahoma, and Lewis Allen, Ass't Co. Atty., to represent the defendants, and both sides agreed in open court that this trial be a final hearing and trial of this cause, and at the conclusion of the evidence that a final decree be entered in this case, and both sides announced ready for trial and the court, after hearing the evidence of witnesses duly sworn and examined by both the plaintiff and the defendants, and stipulations of counsel for both sides, and being well and fully advised in the premises, finds all the issues in favor of the plaintiff, Juana Paukune, and against the defendants, Vernie Bailess, County Treasurer of Caddo County, Oklahoma, W. B. Coleman, County Assessor of Caddo County, Oklahoma, Board of County Commissioners of Caddo County, Oklahoma, composed of Ted A. Jones, Frank Duncan and George D. Nixon, and each of them.

The court finds that the plaintiff, Juana Paukune, is the owner of the beneficial interest in and to an undivided 1/3

interest in and to the following described land located in Caddo County, State of Oklahoma, to-wit:

SE¼ and SW¼ of the SE¼ of Section 3, and the N½ of the NE¼ of Section 10, Township 5 North, Range 9 West of the Indian Meridian, containing 160 acres;

as evidenced by a certificate called a trust patent, No. 951, issued on the 25th day of August, 1901, to Pau-kune by William McKinley, President of the United States of America and which is recorded in Volume 82 at page 447 of the records of the General Land Office of the United States.

[fol. 89] The court further finds that the trust period mentioned in said trust patent has been extended pursuant to law and is in full force and effect at this time, and that the said land above described is being held by the United States in trust for the sole use and benefit of the plaintiff, who is the wife of Pau-kune who died about 1919, leaving a last will and Testament which was duly admitted to probate in Caddo County, Oklahoma, pursuant to law; that the plaintiff, Juana Paukune, was devised an undivided 1/3 interest in and to said allotment of said Paukune; that the United States possesses a supervisory control over said land above-described which is held by the United States in trust for the sole use and benefit of the allottee, Paukune, and his heirs, throughout the original and any extended period of restriction and that the original period of restriction has been extended pursuant to law and is in full force and effect at this time.

The court further finds that the above described lands are non-taxable under the laws of the United States and the laws of the State of Oklahoma and that no final fee simple patent has been issued and that the fee simple title in and to said lands is still in the United States.

The court further finds that the County Assessor of Caddo County, Oklahoma, has illegally assessed the above described lands for ad valorem taxes, as shown by the tax rolls for the year of 1947 and thereafter, and that said assessment is illegal and without authority of law, and that the same has been illegally extended on the tax rolls of the County Treasurer of Caddo County, Oklahoma for

[fol. 90] the year of 1947 ad valorem taxes and subsequent thereto, and that unless the said County Assessor, County Treasurer and the Board of County Commissioners of Caddo County, Oklahoma, are permanently enjoined from selling said land at tax sale that they will proceed to sell the same, and they should be permanently enjoined from levying, assessing or selling said lands for ad valorem taxes and that the said County Assessor of Caddo County, Oklahoma, and the said County Treasurer of Caddo County, Oklahoma, should strike all assessments against the above-described lands from the assessment records and tax rolls of Caddo County, Oklahoma, and they should be permanently enjoined from advertising said lands for sale for ad valorem taxes.

It is therefore ordered, adjudged and decreed by the court that the said Juana Paukune is the owner of the beneficial interest in and to an undivided 1/3 interest in and to the following described lands located in Caddo County, State of Oklahoma, to-wit:

> SE¼ of the SW¼ and the SW¼ of the SE¼ of Section 3 and the N½ of the NE¼ of Section 10, Township 5 North, Range 9 West, of the Indian Meridian, containing 160 acres;

and that said lands are non-taxable under the laws of the United States and the State of Oklahoma and that the United States owns the fee simple title in and to said land and that no final patent has ever been issued conveying the fee simple title to said lands and that said lands are restricted lands.

It is further ordered, adjudged and decreed by the Court that the County Assessor, County Treasurer and the Board of County Commissioners of Caddo County, State of Okla-[fol. 91] homa, be and are hereby permanently enjoined from assessing and placing said lands upon the assessment records and books and tax rolls of Caddo County, Oklahoma, for ad valorem tax purposes and are permanently enjoined from advertising and selling the above described lands for ad valorem taxes, and they and each of them are ordered to strike said assessments which are now shown on

said records, from the tax records of Caddo County, Oklahoma.

It is further ordered that the costs be taxed against the defendants.

The defendants, and each of them, except to each finding and each order and judgment of the court hereinabove made and exceptions are by the court allowed.

L. A. Wood, District Judge.

O. K. Hatcher & Bond, Attorneys for the Plaintiff.
O. K. Brewster McFadyen, Attorney for the Defendants.
O. K. Frank Limerick, County Attorney, Caddo County, Okla.

[fol. 92] IN THE DISTRICT COURT OF CADDO COUNTY, OKLAHOMA

[Title omitted]

JOURNAL ENTRY OVERRULING MOTION FOR NEW TRIAL AND ALLOWING APPEAL—December 16, 1949

On this 16th day of December, 1949, there came on for hearing the motion of the defendants herein for a new trial, Plaintiff appearing by her attorney, Jim Hatcher and the defendants by their attorney, Frank Limerick, County Attorney of Caddo County, Oklahoma, and Brewster McFadyen, Special Attorney. The Court having heard the arguments of counsel and being fully advised, upon consideration finds that the said motion for new trial should be overruled.

It is therefore ordered and adjudged that the motion of the defendants for a new trial be, and the same is hereby overruled; to which ruling of the Court defendants then and there excepted and gave notice in open court of their intention to appeal to the Supreme Court of the State of Oklahoma.

[fols. 93-99] And said defendants praying an appeal to the Supreme Court, and an extension of time within which to make and serve case-made, it is ordered that an extension of 60 days from this date be granted said defendants

to make and serve case-made, plaintiff to have 10 days thereafter to suggest amendments, same to be settled on 5 days notice in writing by either party. And it is further ordered that no bond be required of the defendants.

L. A. Wood, Judge.

[fol. 100] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA
No. 34,547

VERNIE BAILESS, County Treasurer, Caddo County, Oklahoma, and W. B. COLEMAN, Assessor of Caddo County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS OF CADDO COUNTY, OKLAHOMA, composed of TED A. JONES, FRANK DUNCAN and GEORGE D. NIXON, Plaintiffs in Error,

vs.

JUANA PAUKUNE, Defendant in Error

OPINION—April 29, 1952

SYLLABUS

1. The restrictions under the General Allotment Act and the amendment thereto, February 8th, 1887, c. 119, Section 5, 24 Stat. 389 (25 U. S. C. A. 348), run with the land and are applicable to it, not only in the hands of the allottee, but of his heirs as well, regardless of whether the heirs are of Indian blood or not.

2. Interest of heir in land allotted by Trust Patent under General Allotment Act, February 8th, 1887, c. 119, Section 5, 24 Stat. 389 (25 U. S. C. A. 348), is not subject to ad valorem taxes during trust period.

3. The undertaking of the United States Government in Trust Patent issued pursuant to General Allotment Act, February 8th, 1887, c. 119, Section 5, 24 Stat. 389 (35 U. S. C. A. 348), is to convey the lands at the end of the trust period free of all charge or encumbrance and imposes an obligation to keep the lands free from the burden or charge of State taxation, as well as of every other encumbrance.

[fol. 101] APPEAL FROM THE DISTRICT COURT OF CADDO COUNTY

HON. L. A. WOOD, Judge.

Action by Juana Paukune against Vernie Bailess, County Treasurer, Caddo County, Oklahoma, and W. B. Coleman, Assessor of Caddo County, Oklahoma, and Board of County Commissioners of Caddo County, Oklahoma, composed of Ted A. Jones, Frank Duncan and George D. Nixon. Judgment for the plaintiff and defendants appeal.

AFFIRMED

Frank Limerick, County Attorney of Caddo County, Oklahoma, Brewster McFadyen, all of Anadarko, Oklahoma. For Plaintiffs in Error.

Hatcher and Bond, J. F. Hatcher, Chickasha, Oklahoma. For Defendant in Error.

[fol. 102] PER CURIAM:

This is an action by Juana Paukune to obtain an injunction to enjoin the County Assessor of Caddo County, Oklahoma, from listing and assessing real estate located in Caddo County for ad valorem taxes, and to permanently enjoin the County Treasurer of Caddo County from selling the land for delinquent taxes, striking said land from the tax rolls and enjoining the Board of County Commissioners of Caddo County from claiming any right, title or interest in the lands by reason of the levy and assessment of ad valorem taxes against same. The trial court granted the injunction and the defendants appeal.

The land in question was allotted and Trust Patent No. 951 issued to Paukune, an Apache Indian, dated August 25th, 1901. The Trust Patent reads in part as follows:

> Now Know Ye, That the United States of America, in consideration of the premises and in accordance with the provisions of the fifth section of the Act of Congress of February 8, 1887 (24 Stats. 388), Hereby Declares that it does and will hold the land thus allotted, subject to all the restrictions and conditions contained in said fifth section as modified by the fifth

article of the agreement ratified by said sixth section of the Act of June 6, 1900, for the period of twenty-five years, in trust for the sole use and benefit of the said Pau-kune, or in case of his decease, for the sole use of [fol. 103] his heirs, according to the laws of the State or territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever."

Pau-kune died in 1919, and left a will, which was approved by the Secretary of the Interior, and probated, under which Juana Paukune, his wife, became the owner of an undivided one-third interest in the land and Jose Paukune, his son, became owner of the remaining two-thirds interest in the land. The land is oil producing and is being produced under a departmental lease insofar as the interest of Jose Paukune is concerned. Jose Paukune is enrolled and classed as an Indian. Juana Paukune is carried on the Department of the Interior records as not being an Indian, and is classified as a Mexican.

It was stipulated that the trust period provided for in the Trust Patent had been extended and had not expired at the time of the trial. No patent had been issued to Paukune or to Juana Paukune or Jose Paukune. Juana Paukune had never requested the issuance of a patent to her covering her interest in the land. Juana Paukune testified that she was born in Mexico and that her father was an Indian; but that she did not know the tribe, but that they had tribes in Mexico, the same as in the United States. [fol. 104] It is the opinion of this Court that the question as to whether Juana Paukune is an Indian is, under the facts in this case, not material. Section 5 of the General Allotment Act of February 8, 1887, 24 Stat. 388 (380), mentioned in the Trust Patent issued to Pau-kune, which may be found at page 746, Section 1124 of Oklahoma Indian Land Laws, Second Edition by Mills, reads as follows:

"Trust patent to allottees. (5) That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to

issue therefor in the name of the allottees, which patents shall be of the legal effect, and declared that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the state or territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever; Provided, that the President of the United States may in any case in his discretion extend the period."

25 U. S. C. A. 348, is derived from Section 5 of the General Allotment Act of February 8, 1887, cited above.

Section 8 of the General Allotment Act, which may be found at page 750, paragraph 1134 of Mills Second Edition, Oklahoma Indian Land Laws, provides:

[fol. 105] Par. 1134. Certain tribes excepted from provisions of act.—(8) That the provisions of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osages, Miami and Peorias, and Sacs and Foxes, in the Indian Territory, * * *". See 25 U. S. C. A. 339.

The defendants contend that Juana Paukune is not an Indian and that consequently her interest in the land is subject to ad valorem taxes although no patent has been issued to her, and that the exemption should be limited to Indian heirs of the deceased allottee. The language of the Trust Patent and of the law above stated do not make this distinction either expressly or by inference. It is stated in Mills, Oklahoma Indian Land Laws, Second Edition, Paragraph 354, page 348, as follows:

"The restrictions under the General Allotment Act and amendment run with the land and are applicable to it, not only in the hands of the allottee, but of his heirs as well. Any attempted alienation of the land by the heir, or any beneficiary interested in it or its

rents, or the profits accruing therefrom, during the trust period, is absolutely void. And such restructions are applicable to the heirs, regardless of whether the heirs are of Indian blood or not."

In Reed v. Clinton, et al., 23 Okla. 610, 101 P. 1055, we had occasion to pass upon the validity of a conveyance by a white person who was an heir of an Indian Allottee, and which white person was an adopted member of the tribe. Therein it was said:

[Vol. 106] "The only question involved in this case is as to whether or not the conveyance from the defendant in error, John Clinton, to the father of the plaintiff in error, was valid. Section 5 of the act of Congress approved February 8, 1887 (24 Stat. 389, c. 119; 1 Supp. Rev. St. p. 535; 3 Fed. St. Ann. p. 494), provides: * * * * The plaintiff in error insists that because the defendant in error is a white person, and not an Indian by blood, although he was a member by adoption of said tribe of Indians, such restrictions would not operate as to him, but that it was the intention of Congress not to include in the term 'heirs' white persons, although members of said tribe. The clause, 'if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void,' when considered in connection with the entire section, is plain and unambiguous. We are not permitted to look at the purpose for which the statute may have been passed, with a view of overturning the plain terms of the statute as expressed."

In United States v. Thurston County, Nebraska, et al. 143 Fed. Rep. 287 (C. C. A., 10th Circuit (Nebraska)) the original allottees under the General Allotment Act died and their Indian heirs sold the inherited land with the consent of the Secretary of the Interior and the County sought to tax the proceeds. The Court said concerning the lands sold:

"* * * The lands which were sold were held by the complainant in trust to preserve them for the exclusive use and benefit of the respective Indian allottees and their heirs until the expiration of 25 years from the respective dates of their allotments, and then to convey them to the allottees respectively or their heirs 'in fee discharged of said trust and free of all charge or incumbrance whatsoever.' 22 Stat. 342, Ch. 434 #6; 24 Stat. 389, Ch. 119, #5. The undertaking to convey them at the end of the 25 years free of all charge or incumbrance imposed an obligation to keep them free from the burden or charge of state taxation, as well as of every other incumbrance. U. S. v. Rickert, 188 U. S. 432, 23 S. Ct. 478, 47 L. Ed. 532."

[fol. 107] In Charles S. Childres, State Auditor of the State of Oklahoma, Appt., v. John Beaver and Benjamin Quapaw, 270 U. S. 555, 70 L. Ed. 730, it was stated:

"It must be accepted as established that during the trust or restrictive period Congress has power to control lands within a state which have been duly allotted to Indians by the United States and thereafter conveyed through trust or restrictive patents. This is essential to the proper discharge of their duty to a dependent people; and the means or instrumentalities utilized therein cannot be subjected to taxation by the state without assent of the Federal government."

See also United States v. F. H. Reily, 290 U. S. 33, 78 L. Ed. 154, wherein suit was brought by the United States to enforce its rights and regulations governing allotted Indian land held under a so-called trust patent issued pursuant to Section 5 of the General Allotment Act of February 8, 1887 (25 U. S. C. A., 348), wherein the Court said:

"It is settled, and is conceded, that a restriction on alienation such as is here shown is not personal to the allottee but runs with the land and operates upon the heir the same as upon the allottee. So it is apparent the heir's conveyance was void, unless in some way

the restrictions was removed before the conveyance was made."

Defendants stress the applicability of the case of Levindale Lead and Zinc Mining Company et al v. Coleman, 241 U. S. 432, 60 L. Ed. 1080. This case is not in point for the reason that it involved an Osage tribe allotment and this tribe was expressly excepted from the General Allotment Act.

Affirmed.

[fol. 108] This court acknowledges the services of Attorneys Charles E. Earnheart, James R. Eagleton and Milton R. Elliott, who as Special Masters aided in the preparation of this opinion. These Attorneys were recommended by the Oklahoma Bar Association, approved by the Judicial Council, and appointed by the court.

Halley, V. C. J. and Welch, Corn, Gibson, Davison, Johnson, O'Neal and Bingham, JJ. concur.

[fol. 109] IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

[Title omitted]

PETITION FOR REHEARING BRIEF IN SUPPORT THEREOF AND APPLICATION FOR ORAL ARGUMENT

PETITION FOR REHEARING

Come now the plaintiffs in error, Vernie Bailess, County treasurer, Caddo County, Oklahoma, and W. B. Coleman, Assessor of Caddo County, Oklahoma, and Board of County Commissioners of Caddo County, Oklahoma, composed of Ted A. Jones, Frank Duncan and George D. Nixon, and respectfully represent to the Court that on the 29th day of April, 1952, a decision was handed down in the above [fol. 110] styled and numbered case to the effect that the undivided 1/3 interest of the defendant in error, Juana Paukune, in and to the 160-acre allotment of her deceased restricted Apache Indian husband, Pau-kune, who died in

1919, was impliedly exempt from ad valorem taxes levied by Caddo County for the year 1947, notwithstanding that Juana Paukune is a non-Indian.

The basis of the decision in the foregoing particulars is that the 1/3 interest that Caddo County seeks to tax is being held in trust by the Federal Government for Juana Paukune as the devisee of Pau-kune and that since the Federal Government holds title the interest is as a Federal instrumentality impliedly exempt from ad valorem taxes.

The plaintiffs in error respectfully submit that in reaching the decision that it reached, this Court overlooked the fact that when allotted lands pass into the hands of non-Indians the Federal Government does not hold the non-Indian's interest in trust and the non-Indian can freely alienate his interest which means that that which created a Federal instrumentality, the dependent Indian, disappears and the non-Indian's interest is subject to tax.

Wherefore, premises considered, plaintiffs in error pray for a Re-hearing and a favorable decision.

[fol. 111] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

ORDER DENYING PETITION FOR REHEARING—May 27, 1952

The Clerk is hereby directed to enter the following orders:

* * * * * * *

34,547—Vernie Bailess, Co. Treas., et al. v. Juana Paukune. Petition for rehearing and motion for oral argument denied.

Ben Arnold, Chief Justice.

[fol. 112] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

[Title omitted]

MOTION FOR ORDER STAYING MANDATE—Filed May 28, 1952

Comes now the plaintiffs in error, Vernie Bailess, County Treasurer, Caddo County, Oklahoma, and W. B. Coleman, Assessor of Caddo County, Oklahoma, and Board of County Commissioners of Caddo County, Oklahoma, composed of Ted A. Jones, Frank Duncan and George D. Nixon, and represent and show to the court that on April 29, 1952, this court handed down a decision herein to the effect that the undivided one-third interest of the defendant in error, Juana Paukune, a non-Indian in the allotment of her deceased Apache Indian husband was impliedly exempt from ad valorem taxes levied by Caddo County, Oklahoma, for the year 1947, and for said reason the District Court of Caddo County, Oklahoma, did not err in enjoining the sale of said interest for the purpose of satisfying ad valorem taxes levied for said year 1947.

In connection with the aforesaid decision, the plaintiffs in error timely filed a petition for rehearing which was de-[fol. 113] nied May 27, 1952.

The plaintiffs in error respectfully represent that they are convinced that this court erred in deciding as it did and they therefore intend to seek a review of the decision by the Supreme Court of the United States, which will be done by filing in said Supreme Court of the United States within ninety days from May 27, 1952, a petition for a writ of certiorari.

Wherefore, premises considered, plaintiffs in error, respectfully pray this *this* court enter an order staying its mandate herein until August 25, 1952, pending the filing of a petition for a writ of certiorari in the United States Supreme Court and if such petition is filed that the mandate be further stayed until the Supreme Court of the United States renders a final decision herein.

(signed) R. L. Lawrence; (signed) R. F. Barry, Attorneys for Plaintiffs in Error.

This is to certify that on the 28th day of May, 1952, a true and correct copy of the above and foregoing motion was mailed to J. F. Hatcher of the law firm of Hatcher and Bond at Chickasha, Oklahoma, postage prepaid.

(signed) R. F. Barry, Attorney for Plaintiffs in Error.

[fol. 114] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

[Title omitted]

ORDER STAYING MANDATE—June 12, 1952

On this 12th day of June, 1952, for good cause shown, the mandate of this court herein is ordered issued, but any enforcement of the mandate in the trial court is hereby ordered stayed until August 25, 1952, pending the filing of a petition for writ of certiorari by the plaintiffs in error in the Supreme Court of the United States, and if said petition is filed on or before said August 25, 1952, enforcement of the mandate shall be further stayed until such time as the Supreme Court of the United States renders a final decision herein, or until further order of this Court.

It is further ordered that the nature of the judgment herein is such as not to require the filing of a supersedeas or stay bond on the part of the plaintiffs in error.

Done by order of the Court in conference this 12th day of June, 1952.

(Ben Arnold), Chief Justice.

[fol. 115] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed June 10, 1952

To the Clerk of the above named Court:

You are hereby and herewith advised that the above named Plaintiffs in Error intend to seek a review by the

United States Supreme Court of the decision of the Supreme Court of Oklahoma of April 29, 1952, herein, which review will be sought through a petition for a writ of certiorari and in connection with which petition you are requested to prepare a certified transcript of the record in the above styled and numbered cause, which record should include the following things:

1. Petition in Error.

2. A full and complete transcript of the Case Made filed in your court and certified to by the District Court of Caddo County, Oklahoma.

3. The Supreme Court's decision of April 29, 1952.

[fol. 116] 4. The Plaintiffs' in Error petition for rehearing, excluding the brief in support thereof and application for oral argument.

5. Order of May 27, 1952, denying petition for rehearing.

6. Motion for order staying mandate.

7. Order staying mandate.

8. This praecipe for transcript of record.

Said transcript to be prepared as required by law and the rules of the Supreme Court of the United States and the transcript should be prepared and ready to be filed in the Supreme Court of the United States on or before August 25, 1952.

R. L. Lawrence, R. F. Barry, Attorneys for Plaintiffs in Error.

This is to certify that on the 10th day of June, 1952, a true and correct copy of the above and foregoing Praecipe for Transcript of Record was mailed to J. F. Hatcher of the law firm of Hatcher and Bond at Chickasha, Oklahoma, postage prepaid.

R. F. Barry, Attorney for Plaintiffs in Error.

[fol. 117] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 118] IN THE SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PARTS OF RECORD WHICH SHOULD BE PRINTED

The parties hereto, through their respective counsel, stipulate and agree that the following enumerated parts of the record herein need not be printed:

(a) Praecipe for Summons (R. 20-21).
(b) Summons (R. 22-24).
(c) Praecipe for Subpoena Duces Tecum (R. 29).
(d) Subpoena Duces Tecum (R. 30-31).
(e) Proceeding relating to probate of Pau-kune's Will (R. 41-50), (R. 63-64), and (R. 67-69).
(f) Formal matters appearing in Case-Made (R. 94-99).

The parties stipulate and agree that a summons was duly and regularly issued by the Clerk of the District Court of Caddo County, Oklahoma, and served on all of the petitioners; that Pau-kune's Will was duly and regularly probated by the proper Federal authorities and that Juana Paukune thereunder took an undivided one-third in Paukune's allotment.

It is further stipulated that all portions of the record that are not above specified shall, with the exception of those parts which can be properly deleted under the provisions of Rule No. 13, be printed and, therefore, that only [fol. 119] the following enumerated portions of the record shall be printed:

(1) Petition in Error (R. 3-6).
(2) Petition and Exhibits attached thereto (R. 10-19).
(3) Temporary Restraining Order (R. 25-26).
(4) Answer (R. 27-28).
(5) Opening statement of Mr. Hatcher (R. 32-35).
(6) Opening statement of Mr. McFadyen (R. 35-36).
(7) Stipulation regarding certain Exhibits and photostatic copy of Trust Patent, and copy of report of Examiner of Inheritance of October 23, 1919 (R. 32-39).

(8) Testimony of Juana Paukune taken at proceeding to probate Will (R. 51-62).

(9) Pau-kune's Will (R. 65-66).

(10) Testimony taken in trial court (R. 70-80).

(11) Further statement of Mr. McFadyen and letter from W. B. McGown to S. A. Cook of April 7, 1932 (R. 81-84).

(12) Memorandum of trial courts judgment and further stipulation of parties (R. 85).

(13) Motion for new trial (R. 86-87).

(14) Journal Entry of Judgment (R. 87-91).

(15) Journal Entry Overruling Motion for New Trial and Allowing Appeal (R. 92-93).

(16) Opinion of the Supreme Court of Oklahoma (R. 100-108).

(17) Petition for Rehearing and Order Denying same (R. 109-111).

(18) Motion for Order Staying Mandate (R. 112-113).

(19) Order Staying Mandate (R. 114).

(20) Praecipe for Transcript of Record (R. 115-116).

(21) Certificate of Court Clerk (R. 117).

The undersigned attorneys for the respondent herewith acknowledge receipt of a copy of the certified record to which reference is made herein.

Witness our hands this 28th day of June, 1952.

R. L. Lawrence and R. F. Barry, Attorneys for Petitioners.

Reford Bond, Jr., J. F. Hatcher of Hatcher & Bond, Attorneys for Respondent.

[fol. 120] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 242

VERNIE BAILESS, County Treasurer, Caddo County, Oklahoma, et al., Petitioners,

vs.

JUANA PAUKUNE

ORDER ALLOWING CERTIORARI—Filed October 13, 1952

The petition herein for a writ of certiorari to the Supreme Court of the State of Oklahoma is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

In The
Supreme Court of the United States

No. 242

VERNIE BAILESS, County Treasurer, Caddo County, Oklahoma, and W. B. COLEMAN, Assessor of Caddo County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS OF CADDO COUNTY, OKLAHOMA, composed of TED A. JONES, FRANK DUNCAN and GEORGE D. NIXON,

Petitioners,

VERSUS

JUANA PAUKUNE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA AND BRIEF IN SUPPORT THEREOF

R. L. LAWRENCE,
County Attorney of
Caddo County, Oklahoma,
Anadarko, Oklahoma;

R. F. BARRY,
Attorney for the
Oklahoma Tax Commission,
Oklahoma City, Oklahoma,
Attorneys for Petitioners.

JULY, 1952.

KING LAW BRIEF CO., 222 N.W. THIRD, OKLAHOMA CITY — PHONE 3-2969

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In The
Supreme Court of the United States

No.

VERNIE BAILESS, County Treasurer, Caddo County, Oklahoma, and W. B. COLEMAN, Assessor of Caddo County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS OF CADDO COUNTY, OKLAHOMA, composed of TED A. JONES, FRANK DUNCAN and GEORGE D. NIXON,

Petitioners,

VERSUS

JUANA PAUKUNE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA AND BRIEF IN SUPPORT THEREOF

TO THE SUPREME COURT OF THE UNITED STATES:

The petitioners, above named, respectfully pray for a Writ of Certiorari to the Supreme Court of the State of Oklahoma to review a final decision of said court

rendered April 29, 1952, in a case styled "*Vernie Bailess, Co. Treas. et al., Plaintiffs in Error* v. *Juana Paukune, Defendant in Error*" and Numbered 34547 in said court.

In its decision, a copy of which appears at Pages 100-108 of the certified copy of the record filed herewith and as Appendix I to the Brief in support of this Petition, the Supreme Court of Oklahoma held that where land is allotted by Trust Patent under the General Allotment Act of February 8, 1887, the restrictions against alienation imposed by said Act run with the land and the interest of a non-Indian "heir" of an allottee is impliedly exempt from ad valorem taxation during the trust period, and that for said reason the District Court of Caddo County, Oklahoma, properly enjoined the petitioners as the tax officials of said county and State, from selling the interest of such a devisee (Juana Paukune) in satisfaction of delinquent ad valorem taxes and from levying ad valorem taxes in the future on such an interest. The basis of the decision, which purports to be based upon decisions of this Court, appears in the three paragraphs of the syllabus which we quote:

> "The restrictions under the General Allotment Act and the amendment thereto, February 8, 1887, c. 119, §5, 24 Stat. 389 (25 U.S.C.A. 348), run with the land and are applicable to it, not only in the hands of the allottee, but of his heirs as well, regardless of whether the heirs are of Indian blood or not.
>
> "Interest of heir in land allotted by Trust Patent under General Allotment Act, February 8, 1887,

c. 119, §5, 24 Stat. 389 (25 U.S.C.A. 348), is not subject to ad valorem taxes during trust period.

"The undertaking of the United States Government in Trust Patent issued pursuant to General Allotment Act, February 8, 1887, c. 119, §5, 24 Stat. 389 (25 U.S.C.A. 348), is to convey the lands at the end of the trust period free of all charge or encumbrance and imposes an obligation to keep the lands free from the burden or charge of state taxation, as well as of every other encumbrance."

STATEMENT OF THE FACTS AND OF THE PROCEEDINGS

On August 25, 1901, a Trust Patent was issued to an Apache Indian by the name of Pau-kune, which patent covered one hundred sixty acres of land located in what is now Caddo County, Oklahoma (R. 38). The allotment was made under the terms and provisions of the General Allotment Act of February 8, 1887, 24 Stat. 389.

In 1911, Pau-kune married the respondent, Juana Paukune (R. 52).

In 1919, Pau-kune died testate. His will was duly probated by the proper Federal authorities and an undivided one-third interest in the above referred to allotment passed to Juana Paukune, his surviving non-Indian spouse as a devisee under his will and not as an heir, and the remaining undivided two-thirds interest passed to Jose Paukune, a son of Juana and Pau-kune (R. 65-66).

Juana Paukune is not an Indian; she is by birth and citizenship a Mexican (R. 51 and 71).

The only title ever issued to Pau-kune was the aforesaid Trust Patent and Juana Paukune has never received a fee patent to her undivided one-third interest. The trust period originally provided for in the General Allotment Act has from time to time been extended.

The Secretary of the Interior has for many years construed the General Allotment Act and *Levindale Lead & Zinc Co.* v. *Coleman*, 241 U.S. 432, as freeing allotted lands from all restrictions upon same passing to a non-Indian devisee or heir. See R. 76-77 and letter appearing at Appendix II of the Brief in support hereof.

In 1947, Juana Paukune's undivided one-third interest in Pau-kune's allotment was assessed for ad valorem taxes in the amount of $21.33. Upon her failure and refusal to pay the taxes so assessed, her interest was advertised for sale. She thereupon instituted an action in the District Court of Caddo County, Oklahoma, to enjoin the sale and the further levy of ad valorem taxes against her interest upon the theory that title thereto was in the United States Government and for such reason same was impliedly exempt under the United States Constitution as a Federal instrumentality from taxes.

The action so instituted in the District Court of Caddo County, Oklahoma, was styled "*Juana Paukune Plaintiff* v. *Vernie Bailess, County Treasurer et al., Defendants*," and Numbered 15445 in said court (R. 10).

The first and second paragraphs of the Petition filed in No. 15445 read as follows:

"1. That she is the owner of the beneficial interest in and to an undivided 1/3 interest in and to the following described land located in Caddo County, State of Oklahoma, to-wit:

> Southeast Quarter of Southwest Quarter (SE1/4 SW1/4) and Southwest Quarter of Southeast Quarter (SW1/4 SE1/4), Sec. 3, and North Half of Northeast Quarter (N1/2 NE1/4) of Sec. 10, Township 5 North, Range 9 West of I.M., containing 160 acres,

as evidenced by a certificate called a Trust Patent, #951, issued on the 25th day of August, 1901, issued by William McKinley, President of the United States, and which is recorded in Volume 82 at Page 447 of the records of the General Land Office of the United States; that a copy of said Trust Patent is attached hereto marked plaintiff's Exhibit 1 and made a part of this petition as fully as if set out herein *verbatim;* that the trust period mentioned in said Trust Patent has been extended pursuant to law and said land is being held by the United States in trust for the sole use and benefit of this plaintiff who is the wife of Pau-kune who died about 1919 leaving a will; that the plaintiff inherited an undivided 1/3 interest in and to said allotment; that the United States possesses a supervisory control over the land which is held by the United States for the sole use and benefit of the allottee and his heirs throughout the original or any extended period of restriction (R. 11).

"2. That Title 25 U.S.C.A. 348 provides that at the expiration of said trust period the United States will convey said lands by patent to said Indian or his heirs in fee discharged of said trust and free of all charge or incumbrance whatsoever; that said trust period has not expired and said lands are

non-taxable under the laws of the United States; that no final patent has been issued" (R. 11-12).

The petitioners filed an Answer in No. 15445 and therein alleged that Juana Paukune was a non-Indian and for such reason her interest in Pau-kune's allotment was not exempt from ad valorem taxes (R. 27-28).

Following a trial on the merits on November 21, 1949, the District Court of Caddo County rendered Judgment enjoining the sale of Juana Paukune's interest for delinquent 1947 ad valorem taxes and also enjoined the further levy of ad valorem taxes against her interest during the trust period (R. 87-91). The Judgment so rendered reads in part as follows:

> "* * * that said lands are non-taxable under the laws of the United States and the State of Oklahoma and that the United States owns the fee simple title in and to said land and that no final patent has ever been issued covering the fee simple title to said lands and that said lands are restricted lands" (R. 90).

The defendants filed a Motion for New Trial and upon same being overruled perfected an appeal to the Supreme Court of Oklahoma in connection with which appeal the decision of April 29, 1952, heretofore referred to, was handed down.

The defendants then filed a Petition for Rehearing (R. 109-110) which was denied May 27, 1952 (R. 111), following which action defendants sought (R. 112-113) and obtained a stay of the Mandate and Judgment (R. 114) and then caused to be filed in this Court

a certified copy of all proceedings had in the trial court and in the Supreme Court of Oklahoma.

STATEMENT OF JURISDICTION

The issue presented is whether or not the United States Government holds title to, or such an interest in Juana Paukune's undivided one-third interest in Paukune's allotment which she took as Pau-kune's non-Indian devisee as would render said interest impliedly exempt under the Constitution of the United States from ad valorem taxation as a Federal instrumentality, which issue is a Federal question that has been present in the instant case from its inception.

As suggested by our statement of the issue here presented, there is drawn into consideration the Constitution of the United States and there is also drawn into consideration the General Allotment Act of February 8, 1887 (24 Stat. 389), and amendments thereto, and Sec. 15.1, Title 68, O.S. 1951. Under the provisions of said Section of the Oklahoma law an ad valorem tax is admittedly imposed on Juana Paukune's undivided one-third interest in Pau-kune's allotment unless said interest is impliedly exempt from said tax as a Federal instrumentality.

The portion of the General Allotment Act drawn into direct consideration is Sec. 5, the first two paragraphs of which read as follows:

"That upon the approval of the allotments provided for in this Act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, That the President of the United States may in any case in his discretion extend the period.

"And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void."

Section 15.1, Title 68, O.S. 1951, *supra*, reads as follows:

"All property in this State, whether real or personal, except that which is specifically exempt by law, and except that which is relieved of ad valorem taxation by reason of the payment of an in lieu tax, shall be subject to ad valorem taxation."

This Court has jurisdiction of this proceeding under Sec. 1257, Title 28, U.S.C.A.

QUESTIONS PRESENTED

The review prayed for by this Petition will present the following general question:

> **Is the interest of a non-Indian devisee or heir in lands allotted under the General Allotment Act impliedly immune under the Constitution of the United States from ad valorem taxes as a Federal instrumentality?**

In considering this general question the following questions are presented:

(a) Do the provisions of the 5th Section of the General Allotment Act to the effect that the United States will hold title to lands allotted thereunder in trust for the Indian allottee and his heirs apply to non-Indian devisees?

(b) Do the provisions of the 5th Section of the General Allotment Act which in effect restrict as to alienation the lands allotted thereunder in the hands of the Indian allottee and his heirs apply to a non-Indian devisee?

(c) Assuming that the interest of a non-Indian devisee in lands allotted under the General Allotment Act is restricted against alienation, does this render the interest a Federal instrumentality and impliedly exempt as such from ad valorem taxes?

(d) Is the following quoted rule laid down in *Lewindale Lead & Zinc Mining Co.* v. *Coleman*, 241 U.S. 432, 437, applicable to lands allotted under the

General Allotment Act as well as those allotted under the Osage Allotment Act, which was the Act that was directly involved in the *Levindale case?:*

> "The provisions of the Allotment Act must be construed in the light of the policy they were obviously intended to execute. It was a policy relating to the welfare of Indians — wards of the United States. The establishment of restrictions against alienation 'evinced the continuance to this extent, at least, of the guardianship which the United States had exercised from the beginning.' (Citing cases.) This policy did not embrace white men—persons not of Indian blood — who were not as Indians under national protection, although they might inherit lands from Indians; and, with respect to such persons, it would require clear language to show an intent to impose restrictions."

(e) Is *Childers* v. *Beaver*, 270 U.S. 355, upon which case the Supreme Court of Oklahoma in part based its decision in the instant case, the law today in view of the fact that the case was overruled by *Helvering* v. *Mountain Producers Corp.*, 303 U.S. 376; *Oklahoma Tax Commission* v. *U. S.*, 319 U.S. 598, 603, and *West* v. *Oklahoma Tax Commission*, 334 U.S. 717?

REASONS FOR ALLOWANCE OF WRIT

Petitioners, as reasons for allowance of Writ of Certiorari, allege as follows:

1. The Supreme Court of Oklahoma has decided an important question of Federal law, to-wit:

Is the interest of a non-Indian devisee or heir in land allotted under the General Allotment Act impliedly im-

mune under the Constitution of the United States from ad valorem taxes as a Federal instrumentality contrary to this Court's decisions in *Levindale Lead & Zinc Mining Co.* v. *Coleman*, 241 U.S. 432; *Helvering* v. *Mountain Producers Corp.*, 303 U.S. 376; *Oklahoma Tax Commission* v. *U. S.*, 319 U.S. 598, 603; *Indian Territory Illuminating Oil Co.* v. *Board of Equalization of Tulsa County, Oklahoma*, 288 U.S. 325, 328, and *Oklahoma Tax Commission* v. *Texas Co.*, 336 U.S. 342, 350?

2. If the status of a non-Indian's interest in lands allotted under the General Allotment Act is in fact different from that in lands allotted under other Allotment Acts, then this Court should decide and settle the question and thusly resolve the conflict that exists in the Supreme Court of Oklahoma's opinion in the instant case and those of several of the Circuit Courts of Appeal. For example in *Unkle* v. *Willis* (C.C.A. 8), 281 F. 35, the court held that the *Levindale Co. case* applied to "all Indian allotments" and such is the rationale of a number of other opinions cited in the Brief in support hereof.

Your petitioners further show that the Supreme Court of Oklahoma is the highest court of said State; that the petitioners' Petition for a Rehearing was denied on May 27, 1952; that the Federal question heretofore pointed out has been involved in this case since its inception and that the District Court of Caddo County.

Oklahoma, and the Supreme Court of the State of Oklahoma undertook to base their decisions herein on decisions of this Court.

The petitioners are without right of a review of the decision by the Supreme Court of Oklahoma by appeal (*Oklahoma Tax Commission* v. *Magnolia Petroleum Co.*, 333 U.S. 870) and for said reason relief is sought under this Petition.

Wherefore, your petitioners respectfully pray that a Writ of Certiorari be issued by this Court to the Supreme Court of the State of Oklahoma for the purpose of reviewing said court's decision of April 29, 1952.

Respectfully submitted,

R. L. LAWRENCE,
County Attorney of
Caddo County, Oklahoma,
Anadarko, Oklahoma;

R. F. BARRY,
Attorney for the
Oklahoma Tax Commission,
Oklahoma City, Oklahoma,
Attorneys for Petitioners.

JULY, 1952.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

At Pages 3 to 7 of our Petition for a Writ of Certiorari we stated what we believe to be the pertinent facts and for the sake of brevity we will not restate the facts in this Brief.

We do wish to suggest however that *Mills, Oklahoma Indian Land Laws*, 2nd Ed., serves as a convenient reference to the General Allotment Act and the amendments thereto. See Sections 1118 to 1158, pp. 743 to 763 thereof.

As pointed out in our Petition for a Writ of Certiorari, the Federal question presented by this proceeding is whether or not the interest of a non-Indian devisee or heir in lands allotted under the General Allotment Act, is, as a Federal instrumentality, impliedly immune under the Constitution of the United States from ad valorem taxes.

In its opinion herein the Supreme Court of Oklahoma answered the above question in the affirmative and held that Juana Paukune's undivided one-third interest in the allotment of Pau-kune, an Apache Indian, which interest she took as Pau-kune's non-Indian devisee and not as his heir is, as a Federal instrumentality, impliedly exempt from ad valorem taxes.

The syllabus of the opinion, which under the provisions of Section 977, Title 12, O.S. 1951, as construed

in *Corbin* v. *Wilkinson*, 175 Okl. 247, 52 P. 2d 45, became the law of the case, is quoted at length at Page 2 of our Petition for a Writ of Certiorari. The substance of the syllabus is that (a) restrictions against alienation imposed by the fifth section of the General Allotment Act run with the land and are binding on non-Indian "heirs"; (b) the provisions of said Section of the General Allotment Act to the effect that the United States Government will convey allotted lands at the end of the trust period free of all encumbrances imposed an obligation to keep allotted lands free of State taxation in the hands of non-Indian "heirs," and (c) the interest of a non-Indian "heir" in land allotted under the General Allotment Act is not subject to ad vaorem taxes during the trust period.

In the body of the opinion the court points out that a Trust Patent was issued to Pau-kune in 1901; that Pau-kune died testate in 1919; that under Pau-kune's will his wife Juana Paukune, who was carried on the Department of the Interior's record as a Mexican, took an undivided one-third interest in Pau-kune's allotment and their son, Jose, took the remaining undivided two-thirds; that the trust period provided for in the General Allotment Act had been extended; that a fee patent has not been issued to either Pau-kune or Juana Paukune; that it is immaterial whether Juana Paukune is an Indian or non-Indian because the provisions of the first

paragraph of the fifth Section of the General Allotment Act (which paragraph is quoted at length at Page 8 of our Petition for a Writ of Certiorari) applies to non-Indian heirs as well as Indian heirs.

The court then goes on to cite *Reed* v. *Clinton*, 23 Okl. 610, where it was held that a non-Indian heir's interest in land allotted under the General Allotment Act cannot be alienated: *United States* v. *Thurston County, Nebraska et al.* (C.C.A. 10), 143 F. 287, where the court held that the proceeds of the sale of lands allotted to Omaha and Winnebago Tribes were impliedly exempt in the hands of Indian heirs from taxation; *Childers* v. *Beavers*, 270 U.S. 355, where this Court held that Quapaw estates were not subject to an Oklahoma inheritance tax; *United States* v. *F. H. Reily*, 290 U.S. 33, where this Court held that restrictions against alienation imposed on Kickapoo allotments run with the land and are binding on Indian heirs, and concludes that *Levindale Lead & Zinc Mining Co.* v. *Coleman*, 241 U.S. 432, where this Court held that restrictions imposed by the Osage Allotment Act there involved (34 Stat. 539) were not binding on non-Indian heirs, "is not in point for the reason that it involved an Osage Tribe allotment and this Tribe was expressly excepted from the General Allotment Act."

It is patent that the Osage Allotment Act and the General Allotment Act must vary in some particular that

can be said to be pertinent to the question under consideration before the fact that the Osages were excluded from the latter Act can be considered of any significance. While the Supreme Court of Oklahoma did not undertake to point out what it considered the difference to be, it is obvious that it thought that under the Osage Allotment Act the United States did *not* hold any of the properties of the Osages in trust for Indian heirs and that said properties were *not* restricted in the hands of such heirs. In so concluding, as is made clear in the following cited cases, the court was unquestionably mistaken.

In the comparatively recent case of *West* v. *Oklahoma Tax Commission*, 334 U.S. 717, this Court, after reviewing a number of its earlier decisions, held that legal title to an Osage headright and Osage trust properties in the hands of an Osage heir is in the United States Government and that such properties are restricted in the hands of such an heir.

In *McCurdy* v. *United States*, 264 U.S. 484, 486, this Court held that the lands of the Osages in the hands of the allottees were impliedly immune from ad valorem taxes levied by Osage County, Oklahoma, during the period that the United States Government holds same in trust, which is the basis of the opinion in the instant case.

It is interesting to note that in its opinion in the *Levindale case, supra*, reported in 43 Okl. 13, 140 P.

607, the Supreme Court of Oklahoma cited *W. H. Aaron* v. *United States*, 183 F. 347, which case involved an Osage allotment, as authority sustaining its decision to the effect "that the restrictions upon alienation imposed by the above Act (Osage Allotment Act, 34 Stat. 539) attach to and run with the land, and the inability to convey disqualifies the white heir as well as the immediate Indian allottees." The court held that the interest of Coleman, a white man, in properties inherited from his Osage Indian wife and son was restricted and for said reason he could not convey same and the court so held notwithstanding the fact that the heir involved in the *Aaron case* was full-blood Osage Indian.

As heretofore suggested, Levindale Lead & Zinc Mining Co. perfected an appeal from the aforesaid Judgment of the Supreme Court of Oklahoma to this Court. In reversing the Supreme Court of Oklahoma the following rule was laid down at Page 437 of 241 U.S.:

> "The provisions of the Allotment Act must be construed in the light of the policy they were obviously intended to execute. *It was a policy relating to the welfare of Indians — wards of the United States.* The establishment of restrictions against alienation 'evinced the continuance, to this extent, at least, of the guardianship which the United States had exercised from the beginning.' *Heckman* v. *United States*, 224 U.S. 413, 436, 56 L. ed. 820, 829, 32 Sup. Ct. Rep. 424; *United States* v. *Kagama*, 118 U.S. 375, 384, 30 L. ed. 228, 230, 6 Sup. Ct. Rep. 1109; *United States* v. *Rickert*, 188 U.S. 432, 437, 438, 47 L. ed. 532, 536, 23 Sup. Ct. Rep.

478; *Marchie Tiger* v. *Western Invest. Co.*, 221 U.S. 286, 316, 55 L. ed. 738, 749, 31 Sup. Ct. Rep. 578; *Williams* v. *Johnson*, 239 U.S. 414, 420, 60 L. ed. ____, 36 Sup. Ct. Rep. 150. *This policy did not embrace white men—persons not of Indian blood—who were not as Indians under national protection, although they might inherit lands from Indians; and, with respect to such persons, it would require clear language to show an intent to impose restrictions*" (Italics ours).

The above quoted rule has never been departed from by this Court and has been repeatedly and consistently followed by other courts.

In *Taylor* v. *Jones* (C.C.A. 10), 51 F. 2d 892, 893, the court held that an Osage headright inherited by a Kaw was inalienable, but was alienable in the hands of a non-Indian. We quote from the page indicated:

"* * * Congress has the same power over her and her property as it has over an Osage; doubtless the same considerations of public policy that prompted Congress to withhold from Osages the right to alienate these headrights, prevailed as to Indians of other tribes. *The distinction drawn by Congress between Indians and non-Indians is a rational one*, for as Chief Justice Hughes said in *Levindale Lead Co.* v. *Coleman*, 241 U.S. 432, 437, 36 S. Ct. 644, 646, 60 L. ed. 1080, in speaking of the policy back of the Osage Act of 1906 (34 Stat. 539), 'This policy did not embrace white men—persons not of Indian blood—who were not as Indians under national protection, although they might inherit lands from Indians; and, with respect to such persons, it would require clear language to show an intent to impose restrictions.' But whatever the reason, Congress was careful to limit the authority to non-Indians, and we cannot extend it" (Italics ours).

In *Unkle v. Wills* (C.C.A. 8), 281 F. 29, 35, the court held that the *Levindale case* applied to the lands of the Quapaws (a tribe not mentioned as being excluded from the terms of the General Allotment Act) for the reason that the rationale of the *Levindale case* applied to all Indian Tribes. We quote from the case at the page indicated:

> "The twenty-seventh assignment is that the court erred in its finding that Mrs. Unkle is a white woman. The undisputed evidence establishes that fact. It was clearly admissible, as plaintiff contended that the deed and stipulations of compromise were void for the reason that they had not been approved by the Secretary of Interior. Mrs. Unkle being a white woman, this contention is without merit. *Levindale Lead Co.* v. *Coleman*, 241 U.S. 432, 437, 36 Sup. Ct. 644, 60 L. ed. 1080; *Mixon* v. *Littleton*, 265 Fed. 603, 605, decided by this court. *Although in neither of these cases were Quapaw Indian allotments involved, the reasoning applies to all Indian allotments.* As said in *Levindale Lead Co.* v. *Coleman* * * *" (Italics ours).

Following the above quotation, the court quotes that portion of the *Levindale case* which we have heretofore quoted.

In *Mixon* v. *Littleton* (C.C.A. 8), 265 F. 603, 606, the lands of a Sac and Fox were involved. At the page indicated the court had this to say:

> "* * * As Julia Mixon as a white woman, with no Indian blood, was not included in the policy of national protection against the making of conveyances of allotted lands by Indians, and as there was no express restriction against her conveyance of her property, no reason is perceived why she could not

> convey her expectancy of receiving a patent and to do so by giving a warranty deed. * * *"

Preceding the above quoted matter, the court quotes that portion of the *Levindale case* which we have heretofore quoted.

In *Taylor* v. *Irwin* (C.C.A. 10), 60 F. 2d 495, 497, the court had this to say in connection with an Osage headright:

> "* * * (b) That the policy of the government was to conserve the headrights for the support of the Indians, and to protect them against their own improvidence, a policy which has no application to whites. *Levindale Lead & Zinc Mining Co.* v. *Coleman*, 241 U.S. 432, 36 S. Ct. 644, 60 L. ed. 1080; *Pettit* v. *Commissioner* (C.C.A. 10), 38 F. (2d) 976. * * *"

The court held that headrights in the hands of non-Indians were not restricted and passed to the non-Indian owners' trustee in bankruptcy. As heretofore pointed out this Court holds that the Federal Government holds title to the headrights of the Osage in trust.

The fourth paragraph of the syllabus in the case of *Cook* v. *First National Bank of Pawhuska*, 145 Okl. 5, 8, 291 P. 43, reads as follows:

> "A non-citizen white man who inherits a 'headright' from his enrolled Osage Indian wife takes the same without restriction. The Secretary of the Interior, under the Act of Congress passed April 12, 1924 (43 Stat. L. 94), has no authority, as a condition prerequisite to his approval of a sale of this 'headright,' to require the owner thereof to give a portion of the moneys received from the sale to his minor Indian children."

At the page indicated the Court had the following to say on the issue under discussion:

> "* * * This property owned by him, a white man, was unrestricted unless made so by the Act of April 12, 1924. *Mixon* v. *Littleton* (C.C.A. Eighth Cir.), 265 Fed. 603; *Levindale* v. *Coleman, supra. The government has no policy of supervising white men in their commercial transactions, has no policy to restrain its citizens from free and full activity in barter and trade.* Unless it was the clear intent of Congress to adopt a policy of restricting the citizens of the United States in barter and trade, no such intent will be presumed. *McCurdy* v. *U. S., supra; Chouteau* v. *Com'r of Internal Revenue* (C.C.C.A. Tenth Cir.), 38 Fed. (2nd) 976; *Mixon* v. *Littleton* (C.C.A. Eighth Cir.), 265 Fed. 603; *Levindale* v. *Coleman, supra* * * *." (Italics ours).

In *Johnson* v. *United States* (C.C.A. 10), 64 F. 2d 674, 676, the court disposes of Juana Paukune's argument to the effect that restrictions ran with Paukune's allotment and for said reason the land is restricted in her hands as his devisee, by pointing out that such was not the intent of Congress where land passes to a non-Indian. We quote from the case at the page indicated:

> "If the question were an open one, we would agree with the contention of appellant. The word 'inalienable' contained in the proviso is not adamantine. The Osage statute (34 Stat. 539) provides that the homestead of an Osage 'shall be inalienable' until otherwise provided by Act of Congress. In *Levindale Lead & Zinc Mining Co.* v. *Coleman*, 241 U.S. 432, 36 S. Ct. 644, 646, 60 L. ed. 1080, the facts were that a white man had inherited an interest in an Osage homestead, and the argument

> was made there, as here, *that he could not alienate his interest because the restriction ran with the land. The Supreme Court held that the restriction should be construed as running 'only according to the intendment of the statute.'* It was held that the restriction should be construed in light of the general policy of the United States in its dealing with Indians, a policy which did not include persons of non-Indian blood within its scope. The court upheld a conveyance by the non-Indian which was not approved by the Secretary of the Interior, saying in part: * * *" (Italics ours).

In *Drummond* v. *United States*, 131 F. 2d 568, 570, an Osage and an Otoe took an interest in the lands of a Kaw under the latter's will. It was contended that since the devisees were of a different tribe than the testator, the lands passed to the devisees unrestricted. In denying this contention, the court stated that the argument would be sound if the devisees were non-Indians but wasn't sound since the devisees were Indians and therefore of a class that Congress sought to protect. We quote from the opinion at the page indicated:

> "* * * The restrictions were imposed for the benefit of Indians, not white people, *and would serve no purpose when the lands passed into the ownership of white men.* Congress was concerned with the protection of all Indian heirs under guardianship of the United States, whether members of the Kaw Tribe or other tribes. * * *" (Italics ours).

The reason for exempting the lands of restricted Indians from taxes is stated in *United States* v. *Rickert*, 188 U.S. 432:

"* * * These Indians are yet wards of the nation, *in a condition of pupilage or dependency, and have not been discharged from that condition.* They occupy these lands with the consent and authority of the United States; and the holding of them by the United States under the Act of 1887, and the agreement of 1889, ratified by the Act of 1891, is part of the national policy by which the Indians are to be maintained as well as prepared for assuming the habits of civilized life, and ultimately the privileges of citizenship. To tax these lands is to tax an instrumentality employed by the United States for the benefit and control of this dependent race. * * *" (Italics ours).

The reason given by the Supreme Court in the *Rickert case* and those cases which follow that case is unquestionably without application where a non-Indian is involved, all for the reason that the Federal Government does not even pretend to have any right, title or interest in an allotment which has passed to a non-Indian.

In *Schock* v. *Sweet*, 45 Okl. 51, 58, 145 P. 388 (affirmed 245 U.S. 192), the court, in rejecting the asserted claim of a non-Indian grantee to an exemption from ad valorem taxes, had the following to say at the page of the report above indicated:

"So it will be seen that the decision in *Choate* v. *Trapp, supra*, could not have reasonably been otherwise. But here we have an entirely different question; we are dealing with a different class of citizens and one that is entitled to no protection, save and except that protection which every other citizen of the United States is entitled to receive. The provision as applied to these citizens must be strictly construed against granting the tax exemption; and,

if we fail to find it granted in specific terms and expressed in language about which there can be no doubt, the exemption does not exist. In other words, an exemption from taxation is never presumed; but in all cases of doubt as to the legislative intent, except where the rights of Indians are involved, the presumption is in favor of the taxing power. (Citing numerous cases from the United States Supreme Court.)"

At Page 61 of the Okl. Rep. (Vol. 45) the court observed that:

"* * * On the other hand, Congress could have had no purpose in protecting this property from taxation in the hands of speculators or other non-citizens of the tribes. It would have been an unjust, unnatural, and unwarranted discrimination, which the Federal Government has always studiously refrained from making. * * *"

The quoted observations of the Oklahoma Supreme Court are as apropos today as they were when made in 1914. As late as 1943 this Court pointed out in *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598, 609, that:

"* * * Since Oklahoma has become a State, it has been authoritatively stated that tax losses resulting from tax immunity of Indians have totaled more than $125,000,000. * * *."

We are hopeful that this loss will not be added to by exempting the interest of non-Indians in allotted lands although such lands may be exempt in the hands of the allottee or his Indian heirs.

In passing we wish to point out that *Reed* v. *Clinton*, 23 Okl. 610, 101 P. 1055, which case the Supreme

Court of Oklahoma treated as being conclusive on the question under discussion, was handed down May 21, 1909, while the *Levindale case* was handed down June 5, 1916, but that irrespective of the time element of said opinions the opinions of this Court control questions of Federal law.

In its opinion the Supreme Court of Oklahoma also cites Par. 354, p. 348, of *Mills, Oklahoma Indian Land Laws*, 2nd Ed., to the effect that restrictions imposed by the General Allotment Act are binding on non-Indian heirs as well as Indian heirs. The only authority cited by Mills is *Reed* v. *Clinton, supra,* and therefore the citation of Mills in said opinion does not represent authority in addition to the *Reed case.*

The case of *Childers* v. *Beavers*, 270 U.S. 333, cited by the Supreme Court of Oklahoma as sustaining its decision herein was overruled by *Helvering* v. *Mountain Producers Corp.*, 303 U.S. 376; *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598, 603, and *West* v. *Oklahoma Tax Commission, supra.*

JUANA PAUKUNE IS A DEVISEE AND NOT AN HEIR

The right of Pau-kune to alienate his allotment by the will under which Juana Paukune took an undivided one-third of his allotment is found in an Act of February 14, 1913, 37 Stat. 678, 25 U.S.C.A. 373. Under said Act Pau-kune was free to disinherit Juana Paukune

if he so chose, *Blanset* v. *Cordin*, 256 U.S. 319, which means that Juana Paukune took her interest not as an heir but as a devisee. We add that if she had taken as an heir she would have taken an undivided one-half interest instead of an undivided one-third interest.

Sec. 213, Title 84, O.S. 1951.

The foregoing is significant when it is remembered that the General Allotment Act makes no reference to devisees or beneficiaries and, as heretofore pointed out, the Supreme Court of Oklahoma treated Juana Paukune as an heir and not as a devisee.

THE FACT THAT JUANA PAUKUNE HAS NOT RECEIVED A FEE PATENT IS WITHOUT SIGNIFICANCE

The fact that Juana Paukune has not received a fee patent to her interest in Pau-kune's allotment is without significance. As the non-Indian devisee of Pau-kune, she owned an unrestricted undivided one-third interest in the allotment and for such reason could alienate same as freely as though the land had been other than allotted land.

In *Mixon* v. *Littleton*, *supra*, the court had this to say at Page 605 of 265 F.:

> "The Interior Department construed the Sac and Fox Allotment Act as authorizing the conveyance of the fee to Julia Mixon of her share in the allotted land, and the United States granted a patent to her for the portion involved in this suit. There is no clear language in the Allotment Act showing an in-

tent to impose restrictions upon her right to convey this land before the patent was issued. It is contended that there is no right to make a conveyance while the fee is held in trust and a patent has not issued, but it is now settled that the equitable interest in allotted land or lands held in trust may be conveyed where there is no restriction imposed. *Mullen* v. *United States*, 224 U.S. 448, 457, 32 Sup. Ct. 494, 56 L. ed. 834; *Goat* v. *United States*, 224 U.S. 458, 470, 32 Sup. Ct. 544, 56 L. ed. 841; *Doe* v. *Wilson*, 23 How. 457, 463, 16 L. ed. 584; *Crews* v. *Burcham*, 1 Black. 352, 356, 17 L. ed. 91."

In the *Mixon case* it is pointed out that the construction placed on Indian statutes by the Interior Department will be given weight, which is but a statement of the general rule applied by this and other courts, and for such reason the construction placed on the statutes treating with the Apaches by the Interior Department is important and possibly decisive. We turn to a discussion of that policy.

At R. 83-84 will be found W. B. McCown's letter under date of April 7, 1932, to S. A. Cook of Apache, Oklahoma. In this letter it is made clear that the Kiowa Indian Agency construed the Federal statutes as entitling Juana Paukune to a fee patent and that Mr. Cook "should advise her that something must be done as the Department is unwilling to hold her share in trust any longer as she has no Indian blood." In the same letter Mr. McCown stated that "Juana Paukune is a very hard person to deal with" and it is to be assumed that she refused to take a fee patent.

June 14, 1930, C. J. Rhoades, Commissioner of Indian Affairs advised John A. Buntin, District Superintendent in Charge of the Kiowa Indian Agency that "the Department has given several decisions and opinions in cases involving white heirs, in which it has been held that when Indian trust property passes by descent to a white heir, such property is freed from the trust" and that the non-Indian is entitled to a fee patent. In support of his statement, Mr. Rhoades cites the *Levindale case* and other cases. A copy of Mr. Rhoades' letter appears as Appendix II hereof. While this letter is not in evidence, we assume that Juana Paukune will have no objection to our making reference thereto for the reason that Mr. Hatcher as her attorney, stated at the trial in connection with the introduction in evidence of Mr. McCown's letter that "I don't have any objection because it sets out the policy of the Government" (R. 82) and Mr. Rhoades' letter merely elaborates on and explains in some detail the reasoning underlying the Federal Government's policy.

We are advised that under the present policy of the Secretary of the Interior there is but limited supervision of the affairs of Apaches and of the other tribes whose affairs are administered through the Kiowa Indian Agency at Anadarko, Oklahoma. It seems the agency at present merely serves the Indians in much the same way a bank serves a non-Indian.

A FEDERAL INSTRUMENTALITY IS GRANTED IMPLIED IMMUNITY FROM TAXES IN ORDER TO PROTECT THE FEDERAL GOVERNMENT

As shown, the United States Government has, through the Secretary of the Interior, disclaimed any right, title or interest in Juana Paukune's interest in Pau-kune's allotment and it is not claimed that a taking of said interest will hinder, obstruct or burden the Federal Government in any way in administering the affairs of the Apache Indians.

In *I. T. I. O.* v. *Board of Equalization of Tulsa County, Okla.*, 288 U.S. 325, 328, the oil company contended that its share of oil produced from restricted Indian lands was impliedly exempt from ad valorem taxes for the reason that it acted as a Federal instrumentality. In rejecting the contention so made the Court had the following to say at the page indicated:

> "* * * Such immunity as petitioner enjoyed as a governmental instrumentality inhered in its operation as such, and being for the protection of the Government in its function extended no further than was necessary for that purpose. The holding of the oil in question, which had been segregated and withdrawn from the restricted lands as petitioner's exclusive property, awaiting disposition at petitioner's pleasure, was for its sole advantage and cannot be said to be so identified with its operations as a governmental instrumentality as to entitle it to exemption from the general property taxes imposed by the State in return for the protection the State afforded. * * *"

In *Oklahoma Tax Commission* v. *The Texas Co. and Magnolia Petroleum Company*, 336 U.S. 342, the right of Oklahoma to impose a gross production tax on the properties of lessees producing oil and gas under departmental leases covering restricted Indian lands of the Apaches and other Indians allotted under the General Allotment Act was involved. In that case the Magnolia Petroleum Company conceded that its working interest in Juana Paukune's interest in the lands that is here involved was subject to tax. See Footnote 4, p. 345 of the U.S. Rep.

The following was pointed out in the *Texas case* at Page 365 of the U.S. Rep.:

> "* * * intergovernmental immunity remains for the most part. But, so far as concerns private persons claiming immunity for their ordinary business operations (even though in connection with governmental activities), no implied constitutional immunity can rest on the merely hypothetical interferences with governmental functions here asserted to sustain exemption. * * *"

In the *Mountain Producers case, supra* (303 U.S. 384-385), the following quoted rule of law was laid down:

> "In numerous decisions we have had occasion to declare the competing principle, buttressed by the most cogent considerations, that the power to tax should not be crippled by extending the constitutional exemption from taxation of those subjects which fall within the general application of nondiscriminatory laws, and where no direct burden is laid upon the government instrumentality, and there

is only remote, if any, influence upon the exercise of the functions of government. * * *"

RESTRICTIONS AGAINST ALIENATION WITHOUT MORE DO NOT RENDER THAT RESTRICTED EXEMPT FROM TAX

In its opinion in the instant case the Supreme Court of Oklahoma held that restrictions against alienation, without more, rendered Juana Paukune's undivided one-third interest in Pau-kune's allotment impliedly exempt from ad valorem taxes, which holding is flatly contrary to a long line of decisions by this Court, many of which are cited in *United States* v. *Hester* (C.C.A. 10), 137 F. 2d 145, 147, from which case we quote at the page indicated:

> "Restrictions against alienation, without more, do not render the restricted lands immune from the operation of the taxing laws of the State of Oklahoma. *Landman* v. *Commissioners*, 10 Cir., 123 F. 2d 787; *Superintendent* v. *Commissioners, supra*, Page 123 F. 2d at 421; *McCurdy* v. *United States*, 246 U.S. 263, 38 S. Ct. 289, 62 L. ed. 706; *Board of County Commissioners* v. *Seber*, 10 Cir., 130 F. 2d 663, affirmed 63 S. Ct. 920, 87 L. ed. ___; *Shaw* v. *Gibson-Zahniser Oil Corp.*, 276 U.S. 575, 48 S. Ct. 333, 72 L. ed. 709; *Oklahoma Tax Commission* v. *United States, supra.*"

At the same page of the opinion the court pointed out that:

> "* * * It is pertinent to remember that the sovereign State of Oklahoma has plenary power to tax all property within its domain, unless specifically restrained by force of Federal law. Indians residing

> in Oklahoma are citizens of that State, and they are amenable to its civil and criminal laws. Their property, unless exempt, is subject to taxation in the same manner as property belonging to other citizens of that State. *Matter of Heff*, 197 U.S. 488, 25 S. Ct. 506, 49 L. ed. 848; *Goudy* v. *Meath*, 203 U.S. 146, 27 S. Ct. 48, 51 L. ed. 130."

The court goes on to hold, citing *Minnesota* v. *United States*, 305 U.S. 382, and *United States* v. *Alabama*, 313 U.S. 274, that the power to tax includes the power to sell the property taxed to satisfy the tax.

TAX EXEMPTIONS ARE NOT GRANTED BY IMPLICATION

The lands of the Apaches are not specifically exempted from tax by the General Allotment Act, or amendments thereto, or by any Congressional Act. Such lands in the hands of the Apache allottee or his Apache heir are, under the authority of *McCulloch* v. *Maryland*, 4 Wheat. 316; *United States* v. *Rickert*, and *McCurdy* v. *United States*, *supra*, impliedly exempt from tax, which exemption arises solely from the fact that the presence of a dependent Indian ward of the Federal Government brings about such a Federal instrumentality as to warrant a tax exemption.

Caddo County does not here seek to tax the interest of an Apache allottee or his heir or devisee and, to the contrary, seeks to tax the interest of a non-Indian, which means that the dependent Indian that has been

held to create a Federal instrumentality that is impliedly exempt from taxes just isn't present. In *Oklahoma Tax Commission* v. *United States*, *supra*, the following will be found:

> "This court has repeatedly said that tax exemptions are not granted by implication. *United States Trust Co.* v. *Helvering*, 307 U.S. 57, 60, 59 S. Ct. 692, 693, 83 L. ed. 1104. It has applied that rule to taxing Acts affecting Indians as to all others. * * *" (319 U.S. 606).

Further on in the opinion the Court pointed out that if estates of members of the Five Civilized Tribes were made exempt from estate taxes some of Oklahoma's citizens would pay more because such estates would pay nothing. Applying the Court's reasoning to this case Juana Paukune who is receiving as much from Caddo County and from the State of Oklahoma as any other non-Indian, should pay her just and fair portion of all taxes.

In *New York* v. *United States*, 326 U.S. 572, 581, it is pointed out that,

> "In the older cases the emphasis was on immunity from taxation. The whole tendency of recent cases reveals a shift in emphasis to that of limitation upon immunity * * *."

which statement is borne out by *Buckstaff Bath House Co.* v. *McKinley*, 308 U.S. 358, and *Alabama* v. *King and Boozer*, 314 U.S. 1, and many other cases, some of which have heretofore been cited.

CONCLUSION

The interest of a non-Indian devisee or heir in the allotted lands of the Apaches is subject to a non-discriminatory ad valorem tax and the Supreme Court of Oklahoma erred in holding to the contrary.

Respectfully submitted,

R. L. LAWRENCE,
County Attorney of
Caddo County, Oklahoma,
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JULY, 1952.

APPENDIX I

"Filed in Supreme Court of Oklahoma, Apr. 29, 1952, Andy Payne, Clerk.

"In the Supreme Court of the State of Oklahoma.

"Vernie Bailess, County Treasurer, Caddo County, Oklahoma; and W. B. Coleman, Assessor of Caddo County, Oklahoma, and Board of County Commissioners of Caddo County, Oklahoma, composed of Ted A. Jones, Frank Duncan and George D. Nixon, Plaintiffs in Error v. Juana Paukune, Defendant in Error. No. 34,547.

SYLLABUS

"1. The restrictions under the General Allotment Act and the amendment thereto, February 8th, 1887, c. 119, Section 5, 24 Stat. 389 (25 U.S.C.A. 348), run with the land and are applicable to it, not only in the hands of the allottee, but of his heirs as well, regardless of whether the heirs are of Indian blood or not.

"2. Interest of heir in land allotted by Trust Patent under General Allotment Act, February 8th, 1887, c. 119, Section 5, 24 Stat. 389 (25 U.S.C.A. 348), is not subject to ad valorem taxes during trust period.

"3. The undertaking of the United States Government in Trust Patent issued pursuant to General Allotment Act, February 8th, 1887, c. 119, Section 5, 24 Stat. 389 (35 U.S.C.A. 348), is to convey the lands at the end of the trust period free of all charge or encumbrance and imposes an obligation to keep the lands free from the burden or charge of State taxation, as well as of every other encumbrance.

"Appeal from District Court, Caddo County; L. A. Wood, Judge.

"Action by Juana Paukune against Vernie Bailess, County Treasurer, Caddo County, Oklahoma, and W. B. Coleman, Assessor of Caddo County, Oklahoma; and Board of County Commissioners of Caddo County, Oklahoma, composed of T. A. Jones, Frank Duncan and George D. Nixon. Judgment for the plaintiff, and defendants appeal. Affirmed.

"Frank Limerick, Co. Atty., Caddo County, and Brewster McFayden, Anadarko, for plaintiffs in error.

"Hatcher & Bond and J. F. Hatcher, Chickasha, for defendant in error.

"*Per Curiam.* This is an action by Juana Paukune to obtain an injunction to enjoin the County Assessor of Caddo County, Oklahoma, from listing and assessing real estate located in Caddo County for ad valorem taxes, and to permanently enjoin the County Treasurer of Caddo County from selling the land for delinquent taxes, striking said land from the tax rolls and enjoining the Board of County Commissioners of Caddo County from claiming any right, title or interest in the lands by reason of the levy and assessment of ad valorem taxes against same. The trial court granted the injunction, and the defendants appeal.

"The land in question was allotted and Trust Patent No. 951 issued to Pau-kune, an Apache Indian, dated August 25, 1901. The Trust Patent reads in part as follows:

> 'Now Know Ye, That the United States of America, in consideration of the premises and in accordance with the provisions of the fifth section of the Act of Congress of February 8, 1887 (24 Stats. 388), Hereby Declares that it does and will hold the land thus allotted, subject to all the restrictions and conditions contained in said fifth section as modified by the

fifth article of the agreement ratified by said sixth section of the Act of June 6, 1900, for the period of twenty-five years, in trust for the sole use and benefit of the said Pau-kune, or in case of his decease, for the sole use of his heirs, according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever.'

"Pau-kune died in 1919, and left a will, which was approved by the Secretary of the Interior, and probated, under which Juana Paukune, his wife, became the owner of an undivided one-third interest in the land and Jose Paukune, his son, became owner of the remaining two-thirds interest in the land. The land is oil producing and is being produced under a departmental lease insofar as the interest of Jose Paukune is concerned. Jose Paukune is enrolled and classed as an Indian. Juana Paukune is carried on the Department of the Interior records as not being an Indian, and is classified as a Mexican.

"It was stipulated that the trust period provided for in the Trust Patent had been extended and had not expired at the time of the trial. No patent had been issued to Pau-kune or to Juana Paukune or Jose Paukune. Juana Paukune had never requested the issuance of a patent to her covering her interest in the land. Juana Paukune testified that she was born in Mexico and that her father was an Indian; but that she did not know the tribe, but that they had tribes in Mexico, the same as in the United States.

"It is the opinion of this court that the question as to whether Juana Paukune is an Indian is, under the facts in this case, not material. Section 5 of the General Allotment Act of February 8, 1887, 24

Stat. 388 (380) mentioned in the Trust Patent issued to Pau-kune, which may be found at Page 746, §1124 of Oklahoma Indian Land Laws, Second Edition by Mills, reads as follows:

> 'Trust patent to allottees. (5) That upon the approval of the allotments provided for in this Act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declared that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, that the President of the United States may, in any case in his discretion extend the period.'

"25 U.S.C.A. 348 is derived from Section 5 of the General Allotment Act of February 8, 1887, cited above.

"Section 8 of the General Allotment Act, which may be found at Page 750, Paragraph 1134 of Mills, Second Edition, Oklahoma Indian Land Laws, provides:

> 'Par. 1134, Certain tribes excepted from provisions of Act.-(8) That the provisions of this Act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osages, Miami and Peorias and Sacs and Foxes, in the Indian Territory, * * *' See 25 U.S.C.A. 339.

"The defendants contend that Juana Paukune is not an Indian and that consequently her interest in

the land is subject to ad valorem taxes although no patent has been issued to her, and that the exemption should be limited to Indian heirs of the deceased allottee. The language of the Trust Patent and of the law above stated do not make this distinction either expressly or by inference. It is stated in Mills, Oklahoma Indian Land Laws, Second Edition, Paragraph 354, Page 348, as follows:

> 'The restrictions under the General Allotment Act and amendment run with the land and are applicable to it, not only in the hands of the allottee, but of his heirs as well. Any attempted alienation of the land by the heir, or any beneficiary interested in it or its rents, or the profits accruing therefrom, during the trust period, is absolutely void. And such restrictions are applicable to the heirs, regardless of whether the heirs are of Indian blood or not.'

"In *Reed* v. *Clinton et al.*, 23 Okl. 610, 101 P. 1055, we had occasion to pass upon the validity of a conveyance by a white person who was an heir of an Indian allottee, and which white person was an adopted member of the tribe. Therein it was said:

> 'The only question involved in this case is as to whether or not the conveyance from the defendant in error, John Clinton, to the father of the plaintiff in error, was valid. Section 5 of the Act of Congress approved February 8, 1887 (24 Stat. 389, c. 119; 1 Supp. Rev. St., p. 535; 3 Fed. St. Ann., p. 494), provides: * * * The plaintiff in error insists that because the defendant in error is a white person, and not an Indian by blood, although he was a member by adoption of said tribe of Indians, such restrictions would not operate as to him, but that it was the intention of Congress not to include in the term "heirs" white persons, although members of said tribe. The clause "if any conveyance shall be made of the lands set

apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void,' when considered in connection with the entire section, is plain and unambiguous. We are not permitted to look at the purpose for which the statute may have been passed, with a view of overturning the plain terms of the statute as expressed.'

"In *United States* v. *Thurston County, Nebraska et al.* (Neb.), 143 Fed. Rep. 287 (C.C.A., 10th Circuit), the original allottees under the General Allotment Act died and their Indian heirs sold the inherited land with the consent of the Secretary of the Interior and the county sought to tax the proceeds. The court said concerning the lands sold:

'* * * The lands which were sold were held by the complainant in trust to preserve them for the exclusive use and benefit of the respective Indian allottees and their heirs until the expiration of 25 years from the respective dates of their allotments, and then to convey them to the allottees respectively or their heirs, "in fee discharged of said trust and free of all charge or incumbrance whatsoever." 22 Stat. 342, ch. 434, No. 6; 24 Stat. 389, ch. 119, No. 5. The undertaking to convey them at the end of the 25 years free of all charge or incumbrance imposed an obligation to keep them free from the burden or charge of State taxation, as well as of every other incumbrance. *U. S.* v. *Rickert*, 188 U.S. 432, 23 S. Ct. 478, 47 L. ed. 532.'

"In *Charles S. Childers, State Auditor of the State of Oklahoma, Appt.* v. *John Beaver and Benjamin Quapaw*, 270 U.S. 555, 70 L. ed. 730, it was stated:

'It must be accepted as established that during the trust or restrictive period Congress has

power to control lands within a State which have been duly allotted to Indians by the United States and thereafter conveyed through trust or restrictive patents. This is essential to the proper discharge of their duty to a dependent people; and the means or instrumentalities utilized therein cannot be subjected to taxation by the State without assent of the Federal government.'

"See, also, *United States* v. *F. H. Reily*, 290 U.S. 33, 78 L. ed. 154, wherein suit was brought by the United States to enforce its rights and regulations governing allotted Indian land held under a so-called trust patent issued pursuant to Section 5 of the General Allotment Act of February 8, 1887 (25 U.S.C.A. 348), wherein the court said:

> "It is settled, and is conceded, that a restriction on alienation such as is here shown is not personal to the allottee but runs with the land and operates upon the heir the same as upon the allottee. So it is apparent the heir's conveyance was void, unless in some way the restriction was removed before the conveyance was made.'

"Defendants stress the applicability of the case of *Levindale Lead & Zinc Mining Co. et al.* v. *Coleman*, 241 U.S. 432, 60 L. ed. 1080. This case is not in point for the reason that it involved an Osage tribe allotment and this tribe was expressly excepted from the General Allotment Act.

"Affirmed.

"This court acknowledges the services of Attorneys Charles E. Earnheart, James R. Eagleton and Milton R. Elliott, who as Special Masters aided in the preparation of this opinion. These attorneys were recommended by the Oklahoma Bar Association, approved by the Judicial Council, and appointed by the court.

"Halley, V.C.J., and Welch, Corn, Gibson, Davison, Johnson, O'Neal, and Bingaman, JJ., concur."

APPENDIX II

"UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS
WASHINGTON

Jun 14, 1930

"L - S
28729 - 30

"Mr. John A. Buntin,
Dist. Supt. in Charge, Kiowa Agency.

"Dear Mr. Buntin:

"Receipt is acknowledged of your letter of May 26, 1930 in which you request a copy of the decision on the law under which restrictions are removed from property inherited from an Indian by a white man.

"In recent years the Department has given several decisions and opinions in cases involving white heirs, in which it has been held that when Indian trust property passes by descent to a white heir, such property is freed from the trust. By a decision dated March 1, 1921, in the case of Manuel Sanchez, a deceased white man, the Department held to this view, citing the court decision in the case of *Levindale Lead & Zinc Mining Company* v. *Coleman* (241 U.S. 432, 437-438). The decision of the court in this case is quoted in part as follows:

> 'The provisions of the Allotment Act must be construed in the light of the policy they were obviously intended to execute. It was a policy relating to the welfare of Indians—wards of the United States. The establishment of restrictions

against alienation "evinced the continuance, to this extent at least, of the guardianship which the United States had exercised from the beginning." * * * This policy did not embrace white men—persons not of Indian blood—who were not as Indians under national protection although they might inherit lands from Indians; and, with respect to such persons, it would require clear language to show an intent to impose restrictions.

"* * * But the fact that the non-member takes in the right of the deceased member is not enough to subject him to restrictions which are plainly imposed for the protection of members. It is urged that the restrictions, by virtue of their terms, were to run with the land until they expired by limitation or were removed (*Bowling* v. *United States*, 233 U.S. 528), but restrictions would not run with the land unless they had attached. And, even where they had attached, they would run only according to the intendment of the statute. We find no indication of an intent that they should apply to lands, or an interest in lands, which had come lawfully into the ownership of white men who were non-members of the tribe. * * *

"The view we have taken of the *ana*pplicability of the restrictions upon alienation in a case like the present finds support in the fact that there was no provision for giving to non-members certificates of competency. Under the seventh paragraph of Section 2, an "adult member" of the tribe, although a full-blood Indian, who could satisfy the Secretary of the Interior of his ability to transact his own business might obtain a certificate and thus be enabled to dispose of his "surplus land"; but a competent white man, not a member, could not be relieved. It would seem to be evident that

such an incongruous result was not intended, the language plainly showing that Indians alone were deemed to be subjected to the restrictions.'

"From the above it appears that restrictions on alienation imposed by acts of Congress run with the land and are binding upon the allottee and upon his heirs only so far as such restrictions affect Indian allottees and Indian heirs. The rule is therefore, that restrictions are released from Indian trust property taken by white heirs.

"Accordingly, the Department, in the *Sanchez case* ordered a fee patent to be issued for the unrestricted share which had been inherited by the white heir, and has recently suggested 'that it might be advisable to ask the Indian Office to consider whether it would not be a good plan to accompany those heirship cases involving white heirs with a prepared letter addressed to the Commissioner of the General Land Office directing the issuance of fee patents to such heirs covering their shares in the estates, which could be signed by the Secretary simultaneously with his action in the matter of determining the heirs to such estates. This would insure the issuance of fee patents to white heirs at the proper time, whose shares upon the death of the allottee go to them unrestricted.' The Office has been following this suggestion; but, in some cases where to remove restrictions from small undivided shares would greatly complicate the title to the property, efforts are being made to effect partitions.

"Other court decisions pertaining to restrictions on Indian trust property inherited by white persons are contained in *Kenny* v. *Miles* (250 U.S. 58), and *Mixon* v. *Littleton* (265 Fed. 603, 605-606).

Sincerely yours,

C. J. RHOADES,
Commissioner."

In The
Supreme Court of the United States

No. 242

VERNIE BAILESS, County Treasurer, Caddo County, Oklahoma, and W. B. COLEMAN, Assessor of Caddo County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS OF CADDO COUNTY, OKLAHOMA, composed of TED A. JONES, FRANK DUNCAN and GEORGE D. NIXON,

Petitioners,

VERSUS

JUANA PAUKUNE,

Respondent.

REPLY BRIEF OF PETITIONERS

R. L. LAWRENCE,
County Attorney of Caddo County, Oklahoma,
Anadarko, Oklahoma;

R. F. BARRY,
Attorney for the Oklahoma Tax Commission,
Oklahoma City, Oklahoma,
Attorneys for Petitioners.

SEPTEMBER, 1952.

BAYOU LAW BRIEF CO., 222 N.W. THIRD, OKLAHOMA CITY — PHONE 2-2969

TABLE OF CASES

In The
Supreme Court of the United States

No. 242

VERNIE BAILESS, County Treasurer, Caddo County, Oklahoma, and W. B. COLEMAN, Assessor of Caddo County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS OF CADDO COUNTY, OKLAHOMA, composed of TED A. JONES, FRANK DUNCAN and GEORGE D. NIXON,

Petitioners,

VERSUS

JUANA PAUKUNE,

Respondent.

REPLY BRIEF OF PETITIONERS

In our original Brief we stated as a fact that the Secretary of the Interior had long construed the General Allotment Act and the case of *Levindale Lead & Zinc Mining Co.* v. *Coleman*, 241 U.S. 432, which case involved the properties of the Osages, as applying to properties of those Indian Tribes who received their allot-

ments under the General Allotment Act. This is the only fact stated in our Brief that is disputed by respondent. We are of the opinion that the Commissioner of Indian Affairs' letter of June 14, 1930, which is set forth at length as Appendix II of our original Brief, unquestionably supports our statement. If there is any doubt as to the correctness of our statement we suggest that the Secretary of the Interior or Commissioner of Indian Affairs should be requested to file a Brief herein and set forth his Petition on the issue presented by this proceeding.

The respondent also agrees with us on the proposition that the sole issue presented by this proceeding is whether or not the interest of a non-Indian devisee or heir in land allotted under the General Allotment Act is immune from a nondiscriminatory ad valorem tax prior to the expiration of the Trust Period and the issuance of a fee patent to the devisee or heir.

The petitioners and respondent are in sharp conflict on the answer to the foregoing issue. While respondent makes no criticism of the *Levindale case* and the other cases cited in our original Brief that follow that case, they assert in effect that the *Levindale case* (the other cases are not mentioned) can be distinguished from the instant case. She makes the broad assertion that the Osage Allotment Act was enacted for the protection and benefit of Osages only and infers that the General Allotment Act was enacted for the benefit of both Indians and

non-Indians. In attempting to sustain this assertion she does not argue that the Federal Government does not hold legal title to the Trust properties of the Osages or that restrictions on alienation of such properties do not run with same in the hands of Indian heirs of Osages, and accordingly she does not urge the erroneous basis adopted by the Supreme Court of Oklahoma and its opinion herein. To the contrary, respondent argues that certain provisions of the General Allotment Act and other statutes treating with Indians generally that are hereinafter discussed sustain the decision of the Supreme Court of Oklahoma herein.

At Page 8 of her Brief, respondent attempts to distinguish the *Levindale case* from the instant case on the grounds that "(t)he Osage Act provided for the issuance of certificates of competency to Indians, but not white men, and upon the issuance of such certificate the land became subject to taxation" and that "(t)he Osage Allotment Act did not make any provision for protecting white men. It was only for the protection of Indians."

Section 6 of the General Allotment Act was amended by an Act of May 8, 1906, 34 Stat. 182, 25 U.S.C.A., Sec. 349, to read in part as follows:

> "* * * That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any *Indian allottee* is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale,

> incumbrance, or taxation of said land shall be removed * * *." (Italics ours).

Accordingly the General Allotment Act like the Osage Allotment Act provided for the issuance of fee patents to Indian allottees and not to white. (Attention is directed to Article X of the Kiowa, Comanche and Apache Allotment Agreement, 31 Stat. 672-676, Sec. 1261, Page 815, *Mills, Oklahoma Indian Land Laws*, 2nd Ed., under which allotments to some seventeen non-Indians was provided for.)

At Page 9 of her Brief, respondent attempts to further distinguish the *Levindale case* by citing and quoting a portion of the Amendment of April 18, 1912, to the Osage Allotment Act to the effect that "when the heirs of such deceased allottees have certificates of competency or are not members of the tribe, the restrictions on alienation are hereby removed." Since Coleman's wife and son died in 1906, and the conveyance he sought to have set aside was made in 1909, the above quoted 1912 amendment had no bearing on the issue of whether or not, as a non-Indian, Coleman's inherited interest in the lands of the Osages was restricted and moreover, the amendment is not mentioned in the decision.

At Pages 6 and 7 of her Brief, respondent points out that 37 Stat. 678, 25 U.S.C.A., Sec. 373, which is the statute that authorizes Pau-kune to alienate his allotment by will, applies to Quapaws and that restrictions on alienation imposed by the Quapaw Allotment Act

run with the land and are binding on the allottee and his heirs. It is because such is the law that the case of *Unkle* v. *Wills* (C.C.A. 8), 281 F. 29, 35, is squarely in point. In that case the court held that the *Levindale case* applied to the non-Indian heirs of a Quapaw for the reason that the rule applied "to all Indian allotments."

With the exception of the cases hereinafter mentioned the cases cited by respondent at Pages 11 to 18 of her Brief merely hold that the restrictions against alienation imposed by the General Allotment Act run with the land but in none of the cases is it held that the restrictions are binding on non-Indian devisees or heirs. As pointed out in our original Brief and as stated at the beginning of this Brief, trust properties of the Osages are restricted in the hands of Indian heirs and such is true of the trust properties of all Indian Tribes, which means that the *Levindale case* and the cases cited in our original Brief that follow that case are as applicable to a non-Indian devisee or heir taking properties allotted under the General Allotment Act as to such an heir taking properties allotted under any other Allotment Act.

Among the cases cited by respondent at the pages of her Brief last above mentioned is *U. S.* v. *Rickert*, 188 U.S. 432. In that case Indian wards of the United States Government and not non-Indians were involved. As pointed out in our original Brief, the right to tax in

the *Rickert case* was not denied because of any inhibition contained in the General Allotment Act but to the contrary, the right to tax was denied on the grounds that the use made by the Federal Government of the property sought to be taxed was in furtherance of its program of protecting dependent Indian wards which brought about a Federal instrumentality of such a character as to be impliedly exempt under the Constitution of the United States from tax.

Bowling v. *United States*, 233 U.S. 528, involved the right of Indian heirs to convey their interest in lands allotted under an Act of March 2, 1889, 25 Stat. 1013, and not the right to tax as suggested by respondent. The Act relates to the allotment of lands to the United Peorias and Miamis, and it is therein expressly provided that the lands allotted should not be subject to taxation. It is this portion of the Act that this Court merely mentions in its decision.

In *Board of Comrs. of Caddo County, Okla.* v. *United States* (C.C.A. 8), 87 F. 2d 55, the court held that the allotment of the Wichita Indian there involved was not subject to taxation because she had not accepted the fee patent issued her. In the body of the opinion the court assumes and correctly so, that if a fee patent had been issued and accepted, the Indian's land would have been subject to an ad valorem tax.

As pointed out at Page 25 of our original Brief, *Childers* v. *Beavers*, 270 U.S. 555, has been overruled.

We assume that respondent cites and quotes from *County of Mahnomen* v. *United States*, 319 U.S. 474, in an effort to establish that respondent under *Choate* v. *Trapp*, 224 U.S. 665, had a vested right to the tax exemption that rested in her deceased Apache Indian husband under the rule laid down in *United States* v. *Rickert, supra*. *Choate* v. *Trapp* is without application for the reason, as stated in *Fink* v. *Board of Comrs. of Muskogee County, Okla.*, 348 U.S. 399, the Indian's right to a tax exemption "was a property right in the Indian, preserved to him not only for his own interest but in the interest of the policy of the United States regarding him" and cannot be claimed by a non-Indian.

See, also:

Schock v. *Sweet*, 45 Okl. 51
(affirmed 245 U.S. 192);
Scanland v. *Board of Comrs. of Ottawa Co.*, 56 Okl. 56, 155 P. 898.

At Page 16 of her Brief, respondent quotes a portion of an Act of May 27, 1902, 23 Stat. 275, 25 U.S.C.A. 379, and then says that under this Section conveyances by Indians and non-Indians alike must be approved by the Secretary of the Interior. When the entire Section is read and considered a construction entirely different from that given by respondent is reached. We quote the entire Section:

> "The adult heirs of any deceased Indian to whom a trust or other patent containing restrictions upon alienation has been or shall be issued for lands al-

> lotted to him may sell and convey the lands inherited from such decedent, but in case of minor heirs their interests shall be sold only by a guardian duly appointed by the proper court upon the order of such court, made upon petition filed by the guardian, but all such conveyances shall be subject to the approval of the Secretary of the Interior, when so approved shall convey a full title to the purchaser, the same as if a final patent without restriction upon the alienation had been issued to the allottee. All allotted land so alienated by the heirs of an Indian allottee and all land so patented to a white allottee shall thereupon be subject to taxation under the laws of the State or Territory where the same is situate: Provided, That the sale herein provided for shall not apply to the homestead during the life of the father, mother or the minority of any child or children."

The phrases "adult heirs" and "minor heirs" as used in the above quoted statute do not under the authority of the *Levindale case* and the cases that follow that case (especially *Mixon* v. *Littleton*, 265 F. 603, 605) include non-Indians. It therefore follows that the statute does not require the approval by the Secretary of the Interior of deeds of non-Indians.

The only portion of the statute under discussion that attempts to refer to non-Indians is that portion to the effect that "lands so patented to a *white allottee* shall thereupon be subject to taxation under the laws of the State." The word "so" is surplusage for the reason no mention is made of whites or the issuance of patents to whites in the Act. Incidentally, the Act is in fact an appropriation bill. The respondent is admittedly not

a "white allottee" but if she were her allotment, as we construe the statute, would have been taxable from the date patented to her. Is it reasonable to assume that Congress intended that lands allotted and patented to non-Indians should be subject to taxation but that those inherited by non-Indians should not be subjected to taxation?

In *Goudy* v. *Meath*, 203 U.S. 146, the Indian contended that while he had the right to voluntarily alienate his allotment so long as he did not exercise such right his allotment was exempt from tax which is in effect the same argument as made by respondent in the instant case. The contention so made was denied and it was held in substance that since the Indian could alienate his allotment same was subject to tax.

The United States Government does not have any right, title or interest in respondent's undivided 1/3rd interest in Pau-kune's allotment and since such is true, Oklahoma is not here seeking to tax or to sell in satisfaction of a tax property of the United States Government. The respondent will concede that she is the beneficial owner of the property taxed and since she is, she as a non-Indian must show a taxing of an interest that rests in the United States Government before the right to tax and sell in satisfaction of the tax will be denied.

S. R. A., Inc. v. *Minnesota*,
327 U.S. 558;

City of New Brunswick v. *U. S.*,
276 U.S. 457;

Sexton v. *Armstrong Pork Co.*,
208 U.S. 266.

In *Thomas* v. *Gay*, 169 U.S. 264, this Court stated that,

> "* * * it is not perceived that local taxation by a State or Territory, of property of others than Indians would be an interference with congressional power."

Respectfully submitted,

R. L. LAWRENCE,
County Attorney of
Caddo County, Oklahoma,
Anadarko, Oklahoma;

R. F. BARRY,
Attorney for the
Oklahoma Tax Commission,
Oklahoma City, Oklahoma,
Attorneys for Petitioners.

SEPTEMBER, 1952.

No. 242

In the Supreme Court of the United States

OCTOBER TERM, 1952

VERNIE BAILESS, COUNTY TREASURER, CADDO COUNTY, OKLAHOMA, ET AL., PETITIONERS

v.

JUANA PAUKUNE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

MEMORANDUM FOR THE UNITED STATES AMICUS CURIAE

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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 242

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v.

JUANA PAUKUNE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

MEMORANDUM FOR THE UNITED STATES AMICUS CURIAE

STATEMENT

Certain lands were allotted to Paukune, an Apache Indian, and a trust patent thereto was executed under the General Allotment Act of February 8, 1887, 24 Stat. 388. The allottee died in 1919 leaving a will by which he devised an undivided ⅓ interest in the allotment to his widow Juana Paukune, a non-Indian, and an undivided ⅔ interest to his son. After appropriate proceedings the will was approved by the

Secretary of the Interior. However, the land has never been partitioned and the trust period has been extended. County officials have assessed the undivided interest of Juana Paukuné for *ad valorem* property taxes and threaten to sell it, resulting in the institution of this proceeding to enjoin the assessment and sale.

POSITION OF THE UNITED STATES

In accordance with the views expressed in *Levindale Lead and Zinc Mining Co.* v. *Coleman*, 241 U. S. 432, 437–8, 440; *Mixon* v. *Littleton*, 265 Fed. 603 (C. A. 8), and *Unkle* v. *Wills*, 281 Fed. 29, 35 (C. A. 8),[1] the Department of the Interior has consistently taken the position that the limitations upon conveyances of property allotted to Indians, whether under trust patents or under fee patents with restrictions upon alienation, were not intended to be extended to persons who were not of Indian blood. Consequently, the administrative view has been that, when such lands or interests therein pass by devise or descent to non-Indians, there remains simply a ministerial duty of issuing a fee patent and, hence, that although the United States holds the naked legal title the non-Indian heir or devisee may validly convey his equitable interest, and the fee patent

[1] See also *Taylor* v. *Jones*, 51 F. 2d 892, 893 (C. A. 10); *In re Irwin*, 60 F. 2d 495, 497–8 (C. A. 10); *Johnson* v. *United States*, 64 F. 2d 674, 676 (C. A. 10); *Drummond* v. *United States*, 131 F. 2d 568, 570 (C. A. 10).

when issued would inure to the benefit of the grantee. In the instant case, the will has been approved and the devise of the undivided interest to Juana Paukune confirmed. The taxes here in question have been assessed only upon that interest. It is, therefore, the position of the United States that such taxation is not forbidden by the General Allotment Act. We are in general accord with the main arguments made by the petitioners.

Respectfully submitted.

ROBERT L. STERN,
Acting Solicitor General.

NOVEMBER 1952.

U. S. GOVERNMENT PRINTING OFFICE: 1952

In The
Supreme Court of the United States

OCTOBER TERM, 1952

No. 242

VERNIE BAILESS, County Treasurer, Caddo County, Oklahoma, and W. B. COLEMAN, Assessor of Caddo County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS OF CADDO COUNTY, OKLAHOMA, composed of Ted A. Jones, Frank Duncan and George D. Nixon,

Petitioners,

VERSUS

JUANA PAUKUNE,

Respondent.

On Petition for Writ of Certiorari
To the Supreme Court of the State of Oklahoma

BRIEF OF RESPONDENT IN OPPOSITION

REFORD BOND, JR.,
JIM HATCHER,
406 Petroleum Bldg.,
Chickasha, Oklahoma,
Attorneys for Respondent.

AUGUST, 1952.

KING LAW BRIEF CO., 222 N.W. THIRD, OKLAHOMA CITY — PHONE 3-5969

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In The
Supreme Court of the United States

OCTOBER TERM, 1952

No. 212

VERNIE BAILESS, County Treasurer, Caddo County, Oklahoma, and W. B. COLEMAN, Assessor of Caddo County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS OF CADDO COUNTY, OKLAHOMA, composed of Ted A. Jones, Frank Duncan and George D. Nixon,

Petitioners,

VERSUS

JUANA PAUKUNE,

Respondent.

On Petition for Writ of Certiorari
To the Supreme Court of the State of Oklahoma

BRIEF OF RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of the State of Oklahoma, which was filed on April 29, 1952, appears in full (R. 46-52).

JURISDICTION

The jurisdictional matter is properly set forth in the Petition.

QUESTIONS PRESENTED

May ad valorem taxes be legally assessed and collected by the State of Oklahoma on an undivided ⅓rd interest devised to a wife of Mexican blood under the will of her full-blood Apache Indian husband, in land allotted by trust patent to the husband under the General Allotment Act of February 8, 1887, c. 119, Section 5, 24 Stat. 389, as amended (25 U.S.C.A. 348) during the trust period, and no final patent having been issued, said trust patent being issued in conformity with said Allotment Act, which provides in part as follows:

> "* * * that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: * * *."

And said trust patent provides as follows (R. 8):

> "Now know ye, That the United States of America, in consideration of the premises and in accordance with the provisions of the fifth section of the Act of Congress of February 8, 1887 (24 Stats. 388), hereby declares that it does and will hold the land thus allotted, subject to all the restrictions and

conditions contained in said fifth section as modified by the fifth article of the agreement ratified by said sixth section of the Act of June 6, 1900, for the period of twenty-five years, in trust for the sole use and benefit of the said Pau-kune, or in case of his decease, for the sole use of his heirs, according to the laws of the State or Territory where such land is located, and that at the (fol. 18) expiration of said period the United States will convey the same by patent to said Indian, or his heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever."

Is the opinion and holding of the Supreme Court of Oklahoma correct in its holding as follows?:

SYLLABUS (R. 46)

"1. The restrictions under the General Allotment Act and the amendment thereto, February 8th, 1887, c. 119, Section 5, 24 Statutes 389 (25 U.S.C.A. 348) run with the land and are applicable to it, not only in the hands of the allottee but of his heirs as well, regardless of whether the heirs are of Indian blood or not.

"2. Interest of heir in land allotted by Trust Patent under General Allotment Act, February 8th, 1887, c. 119, Section 5, 24 Statutes 389 (25 U.S.C.A. 348) is not subject to ad valorem taxes during trust period.

"3. The undertaking of the United States Government in Trust Patent issued pursuant to General Allotment Act, February 8th, 1887, c. 119, Section 5, 24 Statutes 389 (25 U.S.C.A. 348), is to convey the lands at the end of the trust period free of all charge or encumbrance and imposes an obligation to keep the lands free from the burden or charge of State taxation, as well as of every other encumbrance."

STATUTE INVOLVED

The sections of the statutes governing this case are found in the General Allotment Act of February 8, 1887, and can be found at Sections 1118 to 1137, inclusive, of *Mill's Oklahoma Indian Land Laws*, Second Edition (25 U.S.C.A. 331, *et seq.* as amended). 25 U.S.C.A. 348, 339 and 373 are the applicable sections covering the land involved in this case.

STATEMENT

The statement of facts as given on Pages 3 to 7 of the Petition is a fair statement, except that the second paragraph on Page 4 of the Petition about the case of *Levindale Lead & Zinc Mining Co.* v. *Coleman*, 241 U.S. 432, is not applicable to the land involved herein for the reason that that case involved an Osage Indian allotment and is expressly excluded from the General Allotment Act of February 8, 1887 (Sec. 25, U.S.C.A. 339).

ARGUMENT

The case before this Court involves the Apache full-blood Indian Allotment of Pau-kune and is governed by the General Allotment Act of February 8, 1887 (25 U.S.C.A. 348 and 373).

The land involved in this suit was allotted to Pau-kune, a full-blood Apache Indian, and is located in Sec-

tion 10, Township 5 North, Range 9 West, Caddo County, Oklahoma, and trust patent was issued pursuant to Section 5 of the General Allotment Act, on August 25, 1901, for a trust period of 25 years which has been extended pursuant to law. Pau-kune died testate in 1919 and left a will devising a 1/3rd interest in the 160-acre allotment to his Mexican wife, Juana Paukune and the other 2/3rds to his son, Jose Paukune.

We think the statement of facts set out in the Petition is a fair statement, except that we do not concur in the statement that the Secretary of the Interior has construed the General Allotment Act by reason of the holding in the *Levindale Lead & Zinc Mining Co.* v. *Coleman*, 241 U.S. 432, as freeing allotted lands held in trust by the U. S. Government under the General Allotment Act from all restrictions upon passing to a non-Indian devisee or heir, and if he did so construe the same in his letter referred to by the petitioner, it is in contravention of the provisions of Section 5 of the General Allotment Act of February 8, 1887, above referred to.

The petitioner is relying primarily upon the case of *Levindale Lead & Zinc Mining Co. et al.* v. *Charles Coleman*, 241 U.S. 432, 60 L. ed. 1080, which involved lands inherited by a white man from his Osage Indian wife and child, who were members of the Osage tribe. The question involved the construction of the Osage

Allotment Act of June 28, 1906 (34 Stat. 539, Chapter 3572). This Act did not protect non-members.

The Supreme Court of Oklahoma, in the last paragraph of its opinion (R. 52) held that this Osage Indian Allotment case was not a case in point for the reason that it involved an Osage Indian allotment and that the Osage tribe was expressly excepted from the General Allotment Act. The Osage Allotment Act of June 28, 1906, governs Osage allotments and can be found at Sections 1275 to 1308 of *Mill's Oklahoma Indian Land Laws*, Second Edition, and applies only to Osage Indian allotments.

The Act of Congress of February 4, 1913, 37 Stat. 678, c. 55 (25 U.S.C.A. 373), was an Act providing for the disposal by will of allotments of Indians held in trust and provides as follows:

> "That the approval of the will and the death of the testator shall not operate to terminate the trust or restrictive period, but the Secretary of the Interior may, in his discretion, cause the lands to be sold and the money derived therefrom, or so much thereof as may be necessary, used for the benefit of the heir or heirs entitled thereto, remove the restrictions, or cause patent in fee to the legatee or legatees either in whole or in part from time to time as he may deem advisable, or use it for their benefit. Provided also, that this and the preceding section shall not apply to the Five Civilized Tribes or the Osage Indians."

This provision expressly excludes the Osages.

The above quoted provision of the 1913 Act was construed in *Blanset* v. *Cardin*, 256 U.S. 319, 65 L. ed.

950, which involved a Quapaw Indian allotment. The Court said at Page 327 of the opinion:

> "Our conclusion is the same as that of the court of appeals, 'that it was the intention of Congress that this class of Indians should have the right to dispose of property by will under this Act of Congress, free from restrictions on the part of the state as to the portions to be conveyed, or as to the objects of the testator's bounty; provided such wills are in accordance with the regulations and meet the approval of the Secretary of the Interior.' The court added that the conclusion was in accord with the views of the Supreme Court of the State, referring to *Brock* v. *Keifer*, 59 Okla. 5, 157 Pac. 88."

To the same effect is the case of *Hansen* v. *Hoffman*, 113 F. 2d 780, which also involved a Quapaw Indian allotment and construed this same 1913 Act.

The Quapaws were governed by a special Act of March 2, 1895, and amendments thereto (Secs. 1363 to 1366, *Mill's Oklahoma Indian Land Laws*, 2nd Edition). (28 Stat. 907.) The Quapaws were not issued trust patents under the General Allotment Act, but were delivered patents in fee, subject to restrictions upon alienation for a period of twenty-five years from date of patent, and applied to the allottee and his heirs as well and the restrictions ran with the land.

U. S. v. *Noble*, 237 U.S. 74,
59 L. ed. 844;
Ewert v. *Bluejacket*, 259 U.S. 129,
66 L. ed. 858.

LaMotte v. *United States*, 254 U.S. 570, 65 L. ed. 410, involved an Osage Indian allotment and the Court

held that under the Osage Allotment Act, the lands passed to the member's heirs and the lease was procured from them and they were members without Certificate of Competency and the lease had not been approved by the Secretary. In further construing the Act the Court held that the Act of February 14, 1913, expressly excepted Osages. The case was governed by the Osage Act.

We think the confusion has arisen in the case at Bar from the fact that the petitioner is relying upon the *Levindale Lead & Zinc Mining Co. case* which involved an undivided interest in lands inherited by Charles Coleman, a white man, from his Indian wife and child, who were members of the Osage tribe. The Osage Act provided for the issuance of certificates of competency to Indians, but not white men, and upon the issuance of such certificates the land became subject to taxation. This case was strictly governed by the Osage Allotment Act and not the General Allotment Act of February 8, 1887. The Osage Allotment Act did not make any provision for protecting white men. It was only for the protection of Indians.

The case at Bar involves a full-blood Apache Indian allottee under the General Allotment Act of February 8, 1887, 25 U.S.C.A. 348 and 373. Neither of these provisions apply to the Osages; in fact, the General Allotment Act of February 8, 1887, expressly excludes Osages (Section 1134, *Mills' Oklahoma Indian Land Laws*,

Second Edition; 25 U.S.C.A. 339, Section 8, c. 119; Act of February 8, 1887, 24 Stat. 391). The *Levindale Lead & Zinc Mining Co. case* was decided in the District Court of the State of Oklahoma in December, 1910. The Osage Allotment Act of June 28, 1906, which provided for the division of lands and funds of the Osage Indians, is found at Sections 1275 to 1308 of *Mills' Oklahoma Indian Land Laws*, Second Edition. The Supplementary Act of April 18, 1912, amending the Osage Allotment Act of June 28, 1906, is found at Paragraphs 1309 to 1319 of *Mills' Oklahoma Indian Land Laws*, Second Edition. Section 6 of the amendatory Osage Act expressly provided:

> "When the heirs of such deceased allottees have certificates of competency or are not members of the tribe, the restrictions on alienation are hereby removed."

By the plain provisions of the Osage Allotment Act and the amendatory Act thereto, white men and persons not members of the tribe were not restricted.

The Act of February 14, 1913 (25 U.S.C.A. 373), which provided for the disposal of allotments held under trust by will applied to Apache Indians and said Act governs the land involved in this case, 1/3rd of which was devised by Pau-kune to his Mexican wife and 2/3rds to his half-blood Apache Indian son, Jose Paukune. Under the plain provisions of Section 5 of the General Allotment Act of February 8, 1887, and under the plain

provisions of the 1913 Act, *supra*, the trust or restrictive period was not terminated, although the Act does give the Secretary of the Interior authority to sell the land, remove the restrictions, or cause a patent in fee to be issued to the devisee, but the Secretary of the Interior has not seen fit to do this and Juana Paukune's interest in her full-blood Apache Indian husband's allotment is still being held in trust by the United States Government, free of all charge or incumbrance whatsoever and the State of Oklahoma has no right to interfere with the same by attempting to tax it. The respondent does not claim that this land is impliedly exempt; the respondent claims that this land is exempt under the plain provisions of Section 5, of the General Allotment Act of February 8, 1887, and the plain provisions of the Act of February 14, 1913, c. 55, 37 Stat. 678, 25 U.S.C.A. 373, and will remain restricted until the fee simple patent is issued to the devisees of Pau-kune, or until the trust period expires, and that said restrictions run with the land.

I.

THE DECISION BELOW IS CORRECT

The decision of the Supreme Court of Oklahoma follows the uniform rule announced by the Supreme Court of the United States.

The decisions of the Supreme Court of the United States are all in harmony in construing Section 5 of

the General Allotment Act of February 8, 1887 (25 U.S.C.A. 348). There is uniformity and no conflict.

United States v. *Rickert*, 188 U.S. 432, 47 L. ed. 532, was a suit instituted under the direction of the Attorney General of the United States for the purpose of restraining the collection of the tax alleged to be due the County of Roberts, South Dakota, in respect of certain permanent improvements on and personal property used in the cultivation of lands in that county occupied by the Sisseton band of Sioux Indians in the State of South Dakota. At Page 538 of the Law Edition (441 of the United States) the Court said:

> "* * * The patent or grant here referred to is the final patent or grant which invests the patentee or grantee with the title in fee, that is, with absolute ownership. No such patent or grant has been issued to these Indians. So that the appellee cannot sustain the taxation in question under the clause of the State Constitution to which he refers, and the right to tax these lands must rest upon the general authority of the Legislature to impose taxes. But, as already said, no authority exists for the State to tax lands which are held in trust by the United States for the purpose of carrying out its policy in reference to these Indians."

In *Bowling* v. *United States*, 233 U.S. 528, 58 L. ed. 1080, the Court said in discussing the matter of taxation under the General Allotment Act which was extended to the Wea Tribe of Indians, at Page 1083, L. ed.:

"If, therefore, the conveyance by the allottee's heirs in the present case, would otherwise have been subject to cancelation, it was not saved by reason of the judgment entered in their suit against the purchaser.

"The question, then, is whether the restriction imposed by the Act of 1889 was a merely personal one, operative only upon the allottee, or ran with the land, binding his heirs as well. This must be answered by ascertaining the intent of Congress as expressed in the statute. The restriction was not limited to 'the lifetime of the allottee,' as in *Mullen* v. *United States*, 224 U.S. 448, 453, 56 L. Ed. 834, 839, 32 Sup. Ct. Rep. 494, nor was the prohibition directed against conveyances made by the allottee personally. Congress explicitly provided that 'the land so allotted' should not be subject to alienation for twenty-five years from the date of patent. 'Said lands so allotted and patented' were to be exempt 'from levy, sale, taxation, or forfeiture for a like period of years.' The patent was expressly to set forth that 'the land therein described and conveyed' should not be alienated during this period, and all contracts 'to sell or convey such land' which should be entered into 'before the expiration of said term of years' were to be absolutely void. These reiterated statements of the restriction clearly define its scope and effect. It bound the land for the time stated, whether in the hands of the allottee or of his heirs. Moreover, the subsequent legislation, relating to the same subject-matter, which expressly provided for conveyances by heirs of allottees, subject to the approval of the Secretary of the Interior, leaves no room for doubt as to the intention of Congress. *United States* v. *Freeman*, 3 How. 556, 564, 11 L. Ed. 724, 727; *Cope* v. *Cope*, 137 U.S. 682, 688, 34 L. Ed. 832, 834, 11 Sup. Ct. Rep. 222; *Marchie Tiger* v. *Western Invest. Co.*, 221 U.S. 309, 55 L. Ed. 747, 31 Sup. Ct. Rep. 578.

"The conveyance by Wea's heirs came directly within the statutory prohibition, and the later conveyances under which the appellants claim must fall with it."

In the case of *United States* v. *Getzelman* (C.C.A. 10, April 5, 1937), 89 F. 2d 531, in discussing the General Allotment Act, Page 534, the court said:

"(1) It is expressly provided in Section 5 of the General Allotment Act of 1887 that upon the approval of allotments therein authorized, trust patents shall issue containing a provision that the United States will hold the land in trust for a period of twenty-five years; that at the expiration of such period it will be conveyed to the allottee or his heirs discharged of such trust and free of charge or incumbrances; and that any conveyance or contract of conveyance made during that period shall be void. It is further provided that the President shall have power in his discretion to extend the trust period. 24 Stat. 388, 389 (25 U.S.C.A. 348). Allotments to the members of the Pottawatomie Tribe in accordance with the terms of that Act were specifically authorized and expressly confirmed in 1891. 26 Stat. 989, 1017. The original trust patents to John and Mary for their respective allotments were issued under these provisions of law. The equitable title thereupon passed to the allottees, while the legal title remained in the United States in trust for their use and benefit. *United States* v. *Rickert*, 188 U.S. 432, 23 S. Ct. 478, 47 L. Ed. 532; *Hallowell* v. *Commons* (C.C.A.), 210 Fed. 793."

In the case of *United States* v. *F. H. Reily*, 290 U.S. 33, 78 L. ed. 154, a suit was brought by the United States to enforce its rights and regulations governing allotted Indian land held under a so-called trust patent

issued pursuant to Section 5 of the General Allotment Act of February 8, 1887 (25 U.S.C.A. 348), which provided that the land should be inalienable for a designated period which the president might extend and that any alienation contrary to the restriction should be void. The Court said at Page 155 of the L. ed. and at Page 35 of the U.S. Rep.:

> "It is settled, and is conceded, that a restriction on alienation such as is here shown is not personal to the allottee but runs with the land and operates upon the heir the same as upon the allottee. So it is apparent the heir's conveyance was void, unless in some way the restriction was removed before the conveyance was made."

The Court cited with approval the cases of *Bowling* v. *U. S.*, 233 U.S. 528, 535, 58 L. ed. 1080, 1083, and *U. S.* v. *Noble*, 237 U.S. 74, 80, 59 L. ed. 844, 847.

In the case of *Board of County Commissioners of Caddo County, Oklahoma* v. *United States* (C.C.A. 10, December 14, 1936), 87 F. 2d 55, the court said at Page 56:

> "The trust patent issued under the provisions of Section 5 of the Act of February 8, 1887, 24 Stat. 389 (25 U.S.C.A. 348). The trust period fixed was twenty-five years, with the further provision that the President should have power, in his discretion, to extend it. By executive order dated March 18, 1926, the President extended the period ten years. The Act of February 26, 1927, 44 Stat. 1247, 25 U.S.C.A. 352a, authorized the Secretary of the Interior, in his discretion, to cancel any patent in fee simple issued to an Indian allottee during the original trust period or any extension of it, if such pat-

ent was issued without the application or consent of the allottee or his heirs, provided the patentee had not sold or mortgaged any of the land. Acting upon the authority thus conferred, the Secretary made an order on October 31, 1931, canceling the fee patent in question.

"(1) The Act of Congress, and the terms of the patent issued pursuant to it, created an immunity from taxation under the laws of the State. That immunity was a presently vested right in the allottee which was binding upon the State and its subdivisions and could not be taken from her by the mere issuance of the fee patent during the trust period. *Choate* v. *Trapp*, 224 U.S. 665, 32 S. Ct. 565, 56 L. Ed. 941: *Morrow* v. *United States* (C.C.A.), 243 Fed. 854; *United States* v. *Board of Commissioners* (D.C.), 13 Fed. Supp. 641."

In *Egan* v. *McDonald*, 246 U.S. 227, 62 L. ed. 680, the Court said at Page 682:

"McDonald's title was this (1) A twenty-five year patent dated December 12, 1895, for an Indian allotment issued to Weasel under Sec. 11 of Act of Congress, March 2, 1889, Chap. 405, 25 Stat. at L. 888, 891); (2) Deed to R. J. Huston dated October 9, 1908, from Plays and two others therein described as 'sole and only heirs of Weasel, deceased, a Crow Creek Sioux Indian,' approved by the Secretary of the Interior, March 2, 1909, and thereafter duly recorded in the Department of the Interior and the Registry of Deeds; (3) a final decree of distribution of the estate of Weasel in the county court, making distribution of the land to Plays and two others as only heirs; (4) deed from Huston to McDonald, dated November 3, 1910; (5) a decree of the state circuit court, entered in 1912 in a suit brought by McDonald to quiet title, and declaring him to be the owner in fee of the land.

"First: As to the power of Weasel's heirs to convey: The trust patent was issued under Sec. 11 of the Act of Congress of March 2, 1889. Under the provisions of that statute and the terms of the trust patent, the heirs, as well as Weasel, were without power to convey title before the expiration of the twenty-five years. But, by Sec. 7 of the Act of Congress, May 27, 1902 (32 Stat. at L. 275, Chap. 888, Comp. Stat. 1916, Sec. 4223), adult heirs were given power to convey with the approval of the Secretary of the Interior; and it is declared that 'such conveyances * * * when so approved shall convey a full title to the purchaser, the same as if a final patent without restriction upon the alienation had been issued to the allottee.' Congress had, of course, power to remove the restrictions originally imposed upon alienation by heirs. *Williams* v. *Johnson*, 239 U.S. 414, 420, 60 L. Ed. 358, 360, 36 Sup. Ct. Rep. 150."

25 U.S.C.A. 379 (Sec. 7, 23 Stat. 275, c. 888, May 27, 1902):

"* * * but all such conveyances shall be subject to the approval of the Secretary of the Interior, and when so approved shall convey a full title to the purchaser, the same as if a final patent without restriction upon the alienation had been issued to the allottee. All allotted land so alienated by the heirs of an Indian allottee and all land so patented to a white allottee shall thereupon be subject to taxation under the laws of the State or Territory where the same is situate: * * *."

We think the above section is rather significant in that it expressly provides that all the land so alienated by the heirs of an Indian allottee and all lands so patented to a white allottee shall thereupon be subject to taxation, but all the conveyances must be subject to the

approval of the Secretary of the Interior. This shows that the United States intends to keep control over these lands and to hold the fee simple title to them until the Government sees fit to issue a final fee simple patent, at which time these lands will be taxable, or until such time as the Secretary of the Interior sees fit to approve a conveyance.

In *Charles S. Childers, State Auditor of the State of Oklahoma, Appt.* v. *John Beaver and Benjamin Quapaw*, 270 U.S. 555, 70 L. ed. 730, the Court said at Page 732 of the L. ed.:

> "It must be accepted as established that during the trust or restrictive period Congress has power to control lands within a State which have been duly allotted to Indians by the United States and thereafter conveyed through trust or restrictive patents. This is essential to the proper discharge of their duty to a dependent people; and the means or instrumentalities utilized therein cannot be subjected to taxation by the State without assent of the Federal Government."

In the case of *County of Mahnomen* v. *United States*, 319 U.S. 474, 87 L. ed. 1527, an action was brought by the Government in a Federal District Court to recover real estate taxes alleged to have been illegally collected by Mahnomen County Minnesota from Isabelle Garden, an Indian allottee. The county claimed that Garden was an emancipated Indian who paid his taxes voluntarily. The Court said at Page 1530 of L. ed. and Page 476 of U. S. Rep.:

"In 1902, the Secretary of the Interior, acting under congressional authority, issued a patent to this Indian allottee, agreeing to hold a tract of land in trust for twenty-five years 'for the sole use and benefit of the Indian' and then convey the land to her 'discharged of said trust and free of all charge or incumbrance whatsover.' Indian land so held by the Government has been said to be exempt from all State taxation. *United States* v. *Rickert*, 188 U.S. 432, 436-438, 47 L. ed. 532, 535, 23 S. Ct. 478. The first and second Clapp Amendments, passed in 1906 and (March 1) 1907 lifted restrictions previously imposed upon the sale, encumbrance and taxation of the allotments of adult mixed-blood Indians, and in addition declared that 'the trust deeds heretofore or hereafter executed by the Department for such allotments are hereby declared to pass the title in fee simple.' Garden is an adult mixed-blood Indian and has been an adult since 1911, when the first controverted tax payment was made. These amendments evidence 'a legislative judgment that adult mixed-blood Indians are, in the respects dealt with in the Act, capable of managing their own affairs, and for that reason they are given full power and authority to dispose of allotted lands.' *United States* v. *Waller*, 243 U.S. 462, 61 L. ed. 843, 847, 37 S. Ct. 430; *Baker* v. *McCarthy*, 145 Minn. 167, 170, 176 N.W. 643.

"Notwithstanding these Acts of the county concedes, and we assume arguendo, that it was without power to impose a tax upon these allotted lands prior to 1928 against the consent of the Indians. *Choate* v. *Trapp*, 224 U.S. 665, 56 L. ed. 941, 32 S. Ct. 565.

"The Clapp Amendment gives the consent of the United States to state taxation, thus removing the barrier to taxation found to exist in *United States* v. *Rickert*, 188 U.S. 432, 47 L. ed. 532, 23 S. Ct. 478, *supra*; but under *Choate* v. *Trapp*, the Indian

who has gained a vested right not to be taxed, must also consent."

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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AUGUST, 1952.